The Madras Law Journal Reports.

(Reports)

I] JANUARY [1970

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M. M. ISMAIL.

A. R. Ramiah ... *Petitioner**

v.

Reserve Bank of India (Exchange) (Central Department) Fort Glacis, South Beach Road, Madras-1 and another ... *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 100 *and Constitution of India* (1950), *Article* 226—*Relative Jurisdiction.*

Foreign Exchange Regulation Act (*VII of* 1947), *section* 21 (3) (c)—*Decree holder applying to the Reserve Bank for permission to execute the decree—Reserve Bank whether bound to issue notice to judgment-debtor and hear him before granting permission to decree holder failure to give notice to judgment-debtor—Whether violative of natural justice.*

When the High Court deals with an appeal against an appellate order, it will be enough if a question of law is present for admitting the appeal. On the other hand, it is not every question of law that gives jurisdiction to the High Court under Article 226 of the Constitution of India to interfere with an order passed by a Subordinate Tribunal and the error of law which justifies interference must be an error of law apparent on the face of the record. Consequently, the jurisdiction under Article 226 of the Constitution of India in this respect is narrower than the jurisdiction of the High Court considering an appeal against an appellate order with reference to section 100, Civil Procedure Code.

Section 21 (3) (*c*) of the Foreign Exchange Regulation Act does not impose any obligation whatever on the Central Government or the Reserve Bank of India or the person competent to grant the permission to hold an enquiry or to give any notice or opportunity either to the creditor or to the judgment-debtor. From the nature of this case it is the creditor who applies for permission. Once he applies for permission, the Reserve Bank of India or the person granting the permission has necessarily to satisfy himself whether such permission should be granted or not, taking into account the object of the Act. It is only for that purpose the power has been conferred to call for particulars and certainly not for the purpose of giving an opportunity to any party to represent his case or put forward any grievance of his own. Therefore, there is no scope for the argument that section 21 (3) (*c*) of the Act confers a power on the Reserve Bank of India coupled with duty.

*W.P. No. 86 of 1968. 5th November, 1969.

The question of giving an opportunity to a person like the petitioner, of being heard will arise only in quasi-judicial proceedings which will have the effect of affecting the rights of the parties. As far as the permission contemplated by section 21 (3) (*c*) of the Act is concerned it does not purport to affect the rights of any of the parties. The rights and obligations of the parties have already been determined in the suit or legal proceedings instituted in which a decree has been passed in favour of the one party against the other. Once a decree has been passed the Judgment-debtor is under an obligation to discharge the decree debt and it is not the intention or object of the Act to wipe out or obliterate that obligation or to confer any benefit on him with reference to that obligation. That Act was enacted in the interest of National economy and for preserving the foreign exchange of the country. In view of such an object it is entirely foreign to cotend that before the permission as contemplated by section 21 (3) (*c*) of the Act is granted, a notice must be given to the judgment-debtor and the judgment-debtor must be given an opportunity of being heard. What exactly are the requirements of the principles of natural justice and whether they have been complied with or not, will have to be determined with reference to the facts and circumstances of each case. Neither in provisions of section 21 (3) (*c*) of the Act, nor the principles of natural justice can be laid to require that before the Reserve Bank of India grants permission to a decree-holder to execute a decree against the judgmen-debtor, an opportunity of being heard should be given to the judgment-debtor.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records from, and quashing the order of the first respondent, Ref. No. M. A. E. C. Misc. 107/6 (23) 67, dated 11th January, 1967 permitting the second respondent to take steps for executing the decree in O. S. No. 500 of 1965 in the Court of the District Munsif, Sivaganga, against the petitioner.

V. N. Srinivasa Rao, for Petitioner.

V. K. Thiruvengatachari, for *M/s. King* and *Partridge*, for 1st Respondent.

P. Balasubramanian, S. V. Jayaram and *V. Kannan*, for 2nd Respondent.

The Court made the following

ORDER.—While the petitioner herein was carrying on business in Burma, he executed two promissory notes in favour of one V. R. Manickam, and, thereafter in March, 1965, he came to India. The said V. R. Manickam assigned the promissory notes in favour of the second respondent herein, who filed O. S. No. 500 of 1965, on the file of the Court of the District Munsif of Sivaganga, within whose jurisdiction the petitioner was residing. The petitioner in his defence put forward a contention that the suit was not maintainable by reason of the Burma Foreign Exchange Regulation Act, 1947, and that in any event, only a conditional decree could be passed under that Act. The learned District Munsif, overruled the defence and decreed the suit. Thereafter, the second respondent herein applied to the first respondent for permission under section 21 (3) (*c*) of the Foreign Exchange Regulation Act, 1947, hereinafter referred to as the Act, for executing the decree and that permission was granted to the second respondent by an order dated 11th January, 1967. Armed with this permission, the second respondent sought to execute the decree and the petitioner's objection was overruled. Against the order of the executing Court overruling the objection of the petitioner, the petitioner filed Civil Miscellaneous Appeal No. 31 of 1967, on the file of the Court of the Subordinate Judge of Sivaganga, and that appeal also was dismissed on 12th December, 1967. It is at this stage the petitioner filed the present writ petition under Article 226 of the Constitution of India praying for the issue of a writ of *certiorari* to quash the permission granted by the Reserve Bank of India on 11th January, 1967 to the second respondent to execute the decree obtained by him against the petitioner herein.

During the pendency of the Writ petition, the petitioner preferred A.A.A.O. No. 99 of 1968, (*Ramiah-Appellant* v. *Karuppiah Servai-Respondent*), against the order of

the learned Subordinate Judge of Sivaganga made in C.M.A. No. 31 of 1967, to which I had made reference already. This appeal was dismissed at the stage of admission itself by Alagiriswami, J. The contention that was put forward before the learned Judge was that section 21 (3) (c) of the Act contemplated an obligation on the part of the Reserve Bank of India to give an opportunity to the judgment-debtor before granting permission to the decree-holder for executing the decree. The learned Judge overruled this contention. The learned Judge, after referring to the provision contained in section 21 (3) (c) of the Act stated that the provision was merely for the purpose of enabling the authority granting permission to satisfy itself as to whether the permission should be granted and also to have the necessary materials for the purpose of so deciding. The learned Judge was of the view that it was not obligatory on the authority granting permission to give notice either to a judgment-debtor or to a creditor and that it does not speak of an opportunity being given to either of them and that the provision only enables the authority competent to grant the permission to ask either the judgment-debtor or the creditor to produce documents or to give information. The learned Judge held that it was only an enabling provision and not a provision which confers any right either on the judgment-debtor, or on the creditor. It is in this view the learned Judge dismissed the appeal.

In the present writ petition, Mr. V. N. Srinivasa Rao, learned Counsel for the petitioner, contends that the power to grant permission conferred on the Reserve Bank of India under section 21 (3) (c) of the Act is coupled with a duty and, therefore, the Reserve Bank of India ought to have given notice to the petitioner herein before granting the permission to the second respondent. Alternatively, the learned Counsel contends that the principles of natural justice require that the petitioner should have been heard before the permission asked for by the second respondent was granted.

I am of the opinion that, for more than one reason, the writ petition is liable to be dismissed and that there is no substance in the contention of the learned Counsel for the petitioner. In the first place, the identical question as to the validity of the permission granted by the Reserve Bank of India, was the subject-matter of A. A. A. O. No. 99 of 1968, on the file of this Court, and the question raised was decided against the petitioner by a learned Judge of this Court. The fact that the appeal was dismissed at the stage of admission does not in any way obliterate the fact that there is the decision of this Court on the point raised by the petitioner against him. Hence the same question cannot be agitated in proceedings under Article 226 of the Constitution of India. Mr. V. N. Srinivasa Rao contended that the scope of the jurisdiction under the said A. A. A. O. and the jurisdiction under Article 226 of the Constitution of India are distinct and different and therefore it is open to me to go into the question again. I am of the view that this argument is not tenable at all. As a matter of fact, when the High Court deals with an appeal against an appellate order, it will be enough if a question of law is present for admitting the appeal. On the other hand, it is not every question of law that gives jurisdiction to the High Court under Article 226 of the Constitution of India to interfere with an order passed by a Subordinate Tribunal and the error of law which justifies interference must be an error of law apparent on the face of the record. Consequently, if at all, the jurisdiction under Article 226 of the Constitution of India in this respect is narrower than the jurisdiction of the High Court considering an appeal against an appellate order with reference to section 100 of the Civil Procedure Code. Therefore, I am unable to accept this argument.

Mr. V. N. Srinivasa Rao then contended that I am not bound by the conclusion of Alagiriswami, J., that it is open to me to consider the matter afresh and come to a different conclusion and that in this case I must come to such a different conclusion. I am not able to appreciate the argument in the way in which it is presented. Normally speaking, the judgment of a single Judge of this Court is binding on another single Judge unless the latter Judge comes to the conclusion that the conclusion of the former Judge is plainly wrong and, in that event, he cannot take upon himself the responsibility of dissenting from the other learned Judge and the only course

open to him, in order to maintain the comity between the Judges of this Court, and in order that the entire matter is not thrown into a field of uncertainty is to place the matter before the Honourable the Chief Justice for having the matter decided authoritatively by a Bench of this Court. Apart from this aspect, in this particular case, I am in entire agreement with the view of Alagiriswami, J., with reference to the scope of section 21 (3) (*c*) of the Act.

At this stage, it is necessary to refer to the entire section 21 (3) of the Act, which is as follows :—

"Neither the provisions of this Act nor any term (whether expressed or implied) contained in any contract that anything for which the permission of the Central Government or the Reserve Bank is required by the said provisions shall not be done without that permission shall prevent legal proceedings being brought in India to recover any sum which, apart from the said provisions and any such term, would be due whether as a debt, damages or otherwise, but—

(*a*) the said provisions shall apply to sums required to be paid by any judgment or order of any Court as they apply in relation to other sums ; and

(*b*) no steps shall be taken for the purpose of enforcing any judgment or order for the payment of any sum to which the said provisions apply except as respects so much thereof as the Central Government or the Reserve Bank as the case may be, may permit to be paid, and

(*c*) for the purpose of considering whether or not to grant such permission, the Central Government or the Reserve Bank, as the case may be, may require the person entitled to the benefit of the judgment or order and the debtor under the judgment or order, to produce such documents and to give such information as may be specified in the requirement."

From the very language of section 21 (3) (*c*) it is clear that it does not impose any obligation whatever on the Central Government, or the Reserve Bank of India or the person competent to grant the permission to hold an enquiry or to give any notice or opportunity either to the creditor or to the judgment-debtor. From the very nature of the case, it is the creditor who applies for the permission. Once he applies for the permission, the Reserve Bank of India or the person granting the permission has necessarily to satisfy himself whether such permission should be granted or not, taking into account the object of the Act in question. It is only for that purpose the power has been conferred to call for particulars and certainly not for the purpose of giving an opportunity to any party to represent his case or put forward any grievance of his own. Therefore, from the very nature of the case, there is no scope for the argument that section 21 (3) (*c*) of the Act confers a power on the Reserve Bank of India coupled with a duty.

Mr. Srinivasa Rao then contended that the principles of natural justice require that before granting the permission, the Reserve Bank of India ought to have given the petitioner an opportunity of being heard. I am unable to accept this argument. The question of giving an opportunity to a person like the petitioner, of being heard will arise only in quasi-judicial proceedings, which will have the effect of affecting the rights of the parties. As far as the permission contemplated by section 21 (3) (*c*) of the Act is concerned, it does not purport to affect the rights of any of the parties. The rights and obligations of the parties have already been determined in the suit or legal proceedings initiated in which a decree has been passed in favour of the one party against the other. Once a decree has been passe ; the Judgment-debtor is under an obligation to discharge the decree debt and it is not the intention or object of the Act to wipe out or obliterate that obligation or to confer any benefit on him with reference to that obligation. The Act was enacted in the interest of National economy and for preserving the foreign exchange of the country. In view of such an object, it is entirely foreign to contend that before the permission as contemplated by section 21 (3) (*c*) of the Act is granted, a notice must be given to the judgment-debtor and the judgment-debtor must be given an opportunity of being heard. What

exactly are the requirements of the principles of natural justice and whether they have been complied with or not, will have to be determined with reference to the facts and circumstances of each case. Having regard to the object and provisions of the Act, there is no scope for insisting that the principles of natural justice require that before the Reserve Bank of India grants permission to a decree-holder under section 21 (3) (*c*) of the Act for executing the decree it must give an opportunity to the judgment-debtor and hear him.

Mr. V. K. Thiruvenkatachari, learned Counsel for the Reserve Bank of India, brought to my notice the decision of the House of Lords in *Contract and Trading Company* (*Southern*) *Ltd.* v. *Barbey and others*[1]. That case dealt with an action on bills of exchange with reference to the provisions contained in the Exchange Control Act, 1947. In that case, the respondents who carried on business and were resident outside the "scheduled territories" as defined in the Exchange Control Act, 1947, were holders in due course of three bills of exchange of which the appellants were acceptors and which were dishonoured on presentation. The respondents brought an action in the High Court for the amount of the bills and the appellants contended that by reason of the term implied in the bills by section 33 (1), the bills were not due and payable since Treasury permission had not been given. That contention was overruled by all the Courts including the House of Lords. I may mention here that the provisions of section 33 (1) of the Exchange Control Act, 1947, correspond more or less to the provisions contained in section 23 of the Act. In dealing with the question Viscount Simonds approved the following observations of Lord Justice Somervell expressed in *Cummings* v. *London Bullion Co., Ltd.*[2]

> "The person entitled to the payment issue a writ. The fact that permission has not been obtained is not a defence to the action. On the one hand the plaintiff can obtain judgment, the money due under the judgment being subject to Part 2 of the Act and the rules to which I have referred. The defendant assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into Court. The act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely, the plaintiff."

In the same judgment, Lord Goddard stated thus:

> "That the Act does not provide a moratorium for debtors but only controls that immediate destination of the payments they make, is also shown I think, by paras. 5 and 6 of the schedule under which these bills could have been admitted to proof had the acceptors become bankrupt, or would have constituted a good petitioning creditor's debt had the debtors committed an available act of bankruptcy."

These observations of the House of Lords with reference to the Exchange Control Act, 1947 are equally applicable to show the purposes and object of the Foreign Exchange Regulation Act, 1947. In the context of these objects, neither the provisions of section 21 (3) (*c*) of the Act, nor the principles of natural justice can be said to require that before the Reserve Bank of India grants permission to a decree-holder to execute a decree against the judgment-debtor, an opportunity of being heard should be given to the judgment-debtor.

For these reasons, I am of the opinion that there is no substance in the Writ Petition and the same fails and is dismissed. There will be no order as to costs.

S.V.J. *Petition dismissed.*

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1. (1960) A.C. 244: (1960) 2 W.L.R. 15: (1959) 3 All E.R. 846.
2. (1952) 1 All E.R. 383: (1952) 1 K.B. 327.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

D. Meenakshisundaram Pillai and others .. *Appellants**

v.

P. Nammalwar and others .. *Respondents.*

Religious endowment—Appointment of trustee to the suit math—Succession governed by the provisions to the will executed by the founder of the math—The trustee to be a thuravi *and not to reside in the math with his wife—Interpretation of qualifications of a trustee—The first defendant, the present trustee, having married two wives, the second wife being his sister's daughter, but not otherwise disqualified from being a trustee, it was duly appointed trustee of the suit math.*

It is clear from Exhibit A-1 (the will executed by the founder of the math) that the founder Vedanayagaswami did not exclude a married man from becoming a trustee of the suit math. But he only wanted the person to be a *thuravi.* In fact, it was not obligatory that the person should take to kashayam. It is true in Exhibit A-2 the successor to Vedanayagaswami has added further conditions, namely, that the trustee should not reside in the math along with his wife and that he should not have family connection or relationship or money transactions. In interpreting the qualifications of a trustee, one should ignore these additional requirements mentioned in Exhibit A-2. A Sudra cannot be Sanyasi in the strict sense of the term. The very fact that the suit math recognises that a married man can be a *thuravi* clearly shows that the trustee need not renounce everything in the world. In fact, it is clear from the evidence adduced by both sides that there is no *thuravi* in the strict sense of the term in the Sirugudi Vellala community from which a trustee can be appointed. The first defendant has married his sister's daughter as his second wife. The said marriage having taken place after such marriages have been prohibited by law, it would be invalid and that the position of his wife who is also his niece is no better than that of a concubine. But he took his sister's daughter in marriage as his second wife as he had no issues by his first wife. Such a marriage was not prohibited by Sastras or Hindu law as administered prior to the prohibition of such marriages by statutes. Having regard to the duties of the trustees, it could not be said that the fact of the first defendant having contracted a second marriage would disentitle him from holding the office of a trustee. In fact, it is not the case of the plaintiffs that the first defendant is not leading a proper life, or his otherwise disqualified from being a trustee of the suit math. In the absence of a clear provision in the terms of will Exhibit A-1 disentitling a person like the first defendant who has married two wives from being appointed as a trustee, we are unable to hold that the first defendant is not competent to be a trustee of the suit math. The use of the word *thuravi* by itself cannot having regard to the facts and circumstances of the case imply that the trustee should be a celibate in order to be a trustee of the suit math. There can be no doubt that the word *thuravi* has been used in a loose sense in Exhibit A-1.

The present case, the succession is governed by the provisions of the will of the founder, Vedanayagaswami. It is clear from the decision of the Privy Council in *Mahant Ram Parkash Das* v. *Mahant Anand Das*, ((1898) I.L.R. 21 Mad. page 1 at 7) that even in cases where the reigning Mahant of a Mutt has the right of selecting his successor, the nomination must fall upon one who is competent to hold the office.

Appeal against the decree of the Court of the Subordinate Judge, Tirunelveli dated 27th June, 1962 in Original Suit No. 61 of 1961.

K. Parasaran, Sri K. Rajavelu and *K. Sengotian*, for Appellants.

V. Thyagarajan, K. Raja Ayyar and *T. S. Srinivasan*, for 1st Respondent.

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*Appeal No. 2 of 1963. 20th February, 1969

P.S. Madusudanan, for 2nd to 4th Respondent.

The Additional Government Pleader, for 7th Respondent.

The Judgment of the Court was delivered by

Sadasivam, J.—The appellants filed the suit in the Lower Court for themselves and as representatives of the Sirugudi Vellala community of Tirunelveli District for a declaration that the first defendant Nammalwar is not the duly appointed trustee of the suit math called Sri Dakshinamoorthi Matam and for framing a scheme for the selection of the head of the math from among the Sirugudi Vellalas of Tirunelveli District having the necessary qualification in the vacancy that would be caused by the reason of the said declaration and to vest the math and its properties in the person so selected and to call upon the first defendant to render a true and proper account of the income and expenditure of the math from May, 1957.

The suit math was founded by one Vedanayagaswami, who executed a registered will Exhibit A-1 dated 20th April, 1920 providing for the management of the suit math. It is clear from the will and particularly from the second schedule of the same giving a description of the charities to be conducted in the math, that it was founded for carrying out the public and religious charities mentioned therein at the samadhi of the founder Gurumatha Sri Michael Sidhar. The founder Vedanayagaswami nomintaed one Pichandiya Pillai *alias* Paramanandha Sadhu as trustee for the math after his lifetime and provided for an Advisory Committee consisting of nine persons mentioned by him. He provided for hereditary succession according to lineal primogenture of D. Vedanayagam Pillai and Kandaswami Pillai, mentioned as Nos. 1 and 9 in the Committee appointed by him. The said D. Vedanayagam Pillai is the maternal uncle of the first plaintiff's father. The sixth defendant, as the elder brother's son of first plaintiff is the person who is entitled to become a member of the committee by hereditary right. But he has become a Christian and he is not entitled to be a member of the Committee. The second plaintiff Ramanathan is the son of Kandaswami Pillai and he is also entitled to become a member of the Advisory Committee by hereditary right. The other members of the Advisory Committee appointed by the original founder Vedanayagaswami had only a life interest in the management of the suit math as Advisory Committee members. Defendants 2 to 5 who are closely related to the first defendant, are now said to be the members of the Advisory Committee. Paramanandha Sadhu, who succeeded Vedanayagaswami as trustee of the suit math, in his turn executed the will Exhibit A-2 providing for his successor. He nominated the first defendant's father Muthu Pillai *alias* Paramanandhaswami as the head of the math after him. Muthu Pillai *alias* Paramanandhaswami in his turn executed the will Exhibit A-3 dated 20th January, 1956 appointing his own son, the first defendant herein, as his successor. The first defendant succeeded to management of the suit math on the death of his father in May, 1957 and this suit has been filed in 1961 questioning the validity of the appointment of the first defendant as the trustee under Exhibit A-3 after exchange of notices evidenced by Exhibits A-8 and A-9.

The founder Vedanayagaswami has mentioned the qualification of the persons to be appointed as trustees in his will Exhibit A-1. According to him, the person nominated should have been born in Sirugudi Vellala community and he should be not less than 35 years of age and should possess good quality, good conduct, sympathy and devotion to Government and he should profess the Hindu Religion. While holding the post of a trustee, it is necessary that he should be a *thuravi*. It is clearly mentioned in the will that it is not, however, obligatory that the said person should wear kashayam (ochre robe). In Exhibit A-2 Paramananda Sadhu, the successor of Vedanayagaswami has added further conditions that the trustee nominated by him should not only remain as *thuravi* but also wear kashayam, that he should remain in the math and perform the pooja, and other services, but should not reside in the math along with his wife or female disciples or female cooks and that he should

not have any family connection or relationship or money transactions. In Exhibit A-3 the first defendant's father has purported to relax the conditions by stating that as some of the conditions mentioned in the wills of his two predecessors are not suitable in the present age, he did not like to mention them in his will. The founder Vedanayagaswami has provided for the devolution of the trusteeship for the management of the suit math and stated the qualifications to be possessed by such trustee and it is not open to his successors to alter the same. In *Gurupada* v. *Manmohan*[1], it has been held that a fundamental change in the devolution of the office of Shebait, which is inconsistent with the term of the original foundation, cannot be valid and that even the founder cannot alter the line of succession unless he has reserved that right to himself. In *Sital Das* v. *Sant Ram*[2], the Supreme Court has stated that succession to Mahantship of Math or religious institution is regulated by custom or usage of the particular institution, except where a rule of succession is laid down by the founder himself who created the endowment.

The main question to be considered in this appeal is whether the appointment of the first defendant as trustee by his father is opposed to the terms and conditions laid down by the original founder Vedanayagaswami in his will Exhibit A-1. Sri K. Parasaran appearing for the appellants urged this appeal only on the ground that the first defendant is not a *thuravi* as required in Exhibit A-1. According to the plaintiff the first defendant was only 30 years old at the time when he succeeded his father as trustee. But according to the first defendant he was more than 34 years old and was " about " 35 years of age as required in Exhibit A-1. Having regard to the requirement in Exhibit A-1 that the trustee appointed should be about 35 years of age and the fact that the first defendant was more than 34 years old at the time of the suit, the learned Subordinte Judge did not consider that the first defendant was disqualified to be the trustee on the ground of under-age and this finding was not attacked in appeal, though a specific ground had been taken in the grounds of appeal.

Thuravi has been translated in the Tamil Lexicon published under the authority of the University of Madras, Volume IV, Part I at page 2004, as ascetic recluse, Sannayasi. In the History of Dharmasastra, Volume II, Part II, in Government Oriental Series, Class B. No. 6, Chapter XXVIII is devoted to Sannyasa. At page 946, there is a passage dealing with the question whether Sudras or women could resort to sannayasa. It is pointed out that if such a question is asked there is likely to be some confusion; and that according to the Bhagvad Gita " Sannayasa " means the giving up of actions springing from desires. It is observed on the strength of Srikara's bhasya on Vedantasutra, that the order of Sannayasa, the peculiar rules of which are recommended by Vedic texts, is only for the three varnas, while mere nyasa (abandonment of wordly pleasures and desires) can be resorted to by women Sudras and mixed castes. In Golapchandra Sarkar, Sastri's Hindu Law, Eighth Edition at page 111, in dealing with inter-caste marriage there is a reference to a passage in Mahabharata as to who is a Brahmana and whether Sudras can be Brahmanas. It is stated that " He is ordained to be Brahmana in whom are found truthfulness, charity, forgiveness, uprightness, harmlessness, austerity and compassion " and that if in a Sudra by birth the characteristic of Brahmanas exists and in a twice born by birth the same does not exist, then the Sudra by birth should not be regarded as a Sudra nor the Brahmana by birth a Brahmana. But the distinction between the claims of Brahmana and Sudra by birth to become a Sanyasi is well recognised even in the decisions of our Courts. Thus, in the decision in *Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai*[3], it is pointed out that all the authorities necessarily and clearly imply that a Sudra cannot enter the order of Yathi or Sannayasi and that the devolution of property left by a deceased person of the Sudra caste who has become an ascetic and renounced the world, is regulated by the ordinary law of inheritence, in the absence of any general or special usage to the

1. A.I.R. 1936 Cal. 215.
2. A.I.R. 1954 S.C. 606 at 609.
3. (1899) I.L.R. 22 Mad. 302.

contrary. In *Somasundaram Chettiar* v. *Vaithilinga Mudaliar*[1], the above decision is referred to with approval. It appears from page 857 of the reports that Sri T. Rangachariyar for the appellants in that case urged that by immemorial usage in Kaliyuga, Sudras can become sanyasis and that such a right is recognised by custom in South India. But as pointed out by Mukherjee in the Hindu Law of Religious and Charitable Trust, 1952 Edition at page 326, the rules guiding these institutions of diverse types which have their origin in customs and usages followed by diffrerent religious orders vary widely from each other. The decision in *Giyana Sambandha Pandara Sannadhi* v. *Kandaswami Tambiran*[2], relates to Saivite Mutts in South India, particularly the Dharmapuram Adhinam. It is clear from page 385 of the reports that "if an ascetic or a hermit is a Brahman he is called a Yati or Sanniyasi, if a Sudara, he is called a Paradesi, and if the Sudra is attached to an Adhinam, he is called a Tambiran, and if he is at the head of the Adhinam, he is called the Pandara Sannadhi". The succession to the Head of such Saivite and other Mutts is governed by custom or usage. Thus in *Ramalingam Pillai* v. *Vythilingam Pillai*[3], it has been laid down by the Judicial Committee of the Privy Council that the only law applicable to the appointment of a Dharmakarta of a mutt or temple is found in custom and practice.

In the present case, the succession is governed by the provisions of the will of the founder Vadanayagaswami. It is clear from the decision of the Privy Council in *Mahant Ram Parkash Das* v. *Mahant Anand Das*[4], that even in cases where the reigning Mahant of a Mutt has the right of selecting his successor, the nomination must fall upon one who is competent to hold the office. It is pointed out by way of illustration in that decision the person chosen may be disqualified by reason of bodily deformity, of bodily disease such as leprosy, of disease of the mind or of the leading of a life which is immoral or is inconsistent with the religious vows of the brotherhood and that in all such cases, the nomination would be void. It is further stated therein that the contracting of marriage is ground of disqualification where by the custom of the mutt the Mahant must be a religious chela and a celibate. In *Sathappayar* v. *Periasami*[5], it is stated that the usage of the institution in that case conveys the impression that either an ascetic or a married man is eligible for the office and that in former times there was a conventional notion that the management of a religious charity by an ascetic was more disinterested than that by a married man and therefore likely to prove more beneficial but when the usage of the institution is clear on this point we are not at liberty to ignore it. It is pointed out that in ordinary parlance, the words paradesi and mutt no doubt, designate a Sudra ascetic and the institution presided over by him but they are of themselves inconclusive since there are mutts in the Madras Presidency of which the representatives are not ascetics. In *Hari Das* v. *Raja Ram*[6], it has been held that there are married and unmarried Bairagis and that there is no prohibition in the Shastras against the marriage of a Bairagi and that the custom of the institutions in question was for the mahant to appoint his successor and the fact that the successor is a married man was no bar to his taking over the office of the mahant.

It is clear from Exhibit A-1 that the founder Vedanayagaswami did not exclude a married man from becoming a trustee of the suit math. But he only wanted the person to be a *thuravi*. In fact, it was not obligatory that the person should take to kashayam. It is true in Exhibit A-2 the successor to Vedanayagaswami has added further conditions, namely, that the trustee should not reside in the math along with his wife and that he should not have family connection or relationship or money transactions. In interpreting the qualifications of a trustee, one should ignore those additional requirements mentioned in Exhibit A-2. A Sudra cannot be Sanniyasi in the strict sense of the term. The very fact that the suit math recognises that a married man can be a *thuravi* clearly shows that the trustee need not renounce everything in the world. It should be noted that the suit math is not like the well known

1. (1917) I.L.R. 40 Mad. 846.
2. (1887) I.L.R. 10 Mad. 375.
3. (1903) I.L.R. 26 Mad. 490.
4. (1898) I.L.R. 21 Mad. 1 at 7 : 8 M.L.J. 113.
5. (1891) I.L.R. 14 Mad. 1 at 9.
6. A.I.R. 1935 Lah. 545.

saivite religious mutts, such as the Dharmapura Adhinam, Thiruvaduthurai Adhinam and Tiruppanandal Adhinam, where spiritual instructions are given and the saivite religion is propagated. The present suit math is only a Samadhi where some charities mentioned in Schedule II to Exhibit A-1 are performed. In fact, it is clear from the evidence adduced by both sides that there is no *thuravi* in the strict sense of the term in the Sirugudi Vellala community from which a trustee can be appointed. The first defendant has married his sister's daughter as his second wife, as spoken to by P.W. 2 Ramanatha Pillai. The said marriage having taken place after such marriages have been prohibited by law, it would be invalid and that the position of his wife who is also his niece is no better than that of a concubine. But he took his sister's daughter in marriage as his second wife as he had no issues by his first wife. Such a marriage was not prohibited by Sastras or Hindu Law as administered prior to the prohibition of such marriages by statutes. Having regard to the duties of the trustees, it wcould not be said that the fact of the first defendant having contracted a second marriage would disentitle him from holding the office of a trustee. In fact, it is not the case of the plaintffs that the first defendant is not leading a proper life, or is otherwise disqualified from being a trustee of the suit math. In the absence of a clear provision in the terms of the will Exhibit A-1 disentitling a person like the first defendant who has married two wives from being appointed as a trustee, who are unable to hold that the first defendant is not competent to be a trustee of the suit math. The use of the word *thuravi* by itself cannot, having regard to the facts and circumstances of the case, imply that the trustee should be a celibate in order to be a trustee of the suit math. There can be no doubt that the word *thuravi* has been used in a loose sense in Exhibit A-1 and we say so having regard to the nature of the math the duties attached to the office of trustee and several other circumstances referred to above.

We are unable to uphold the finding of the learned Subordinte Judge that the suit is hit by section 108 of the Hindu Religious and Charitable Endowments Act. The learned Subordinate Judge has himelf felt the difficulty and he has observed that he finds it difficult to enter a finding that the prayers in the plaint could not be fitted in one or the other of the provisions in the Act. In fact Sri V. Thyagarajan could not show how any of the prayers in the suit could properly form the subject-matter of any of the suits contemplated in the Act under the several provisions such as section 59, 60 etc. It is, however, unnecessary to discuss in detail whether the suit is hit by section 108 of the Madras Hindu Religious and Charitable Endowments Act in view of our concurring with the trial Curt that the first defendant is not ineligible to be a trustee of the suit math, having regard to the terms and conditions of the will Exhibit A-1.

The decree and Judgment of the learned Subordinate Judge are, therefore, confirmed and the appeal is dismissed with costs.

V.M.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

T.S. Doraiswamy Naidu .. *Petitioner**

v.

Seth T.N. Ahuja & Co., by its partner V.K.A. Chugh .. *Respondent.*

Transfer of Property Act (IV of 1882), sections 52 and 65-A—Scope—Mortgage—Mortgagor in possession—Suit on mortgage—Lease granted by mortgagor in conformity with section 65-A, if would be valid against the mortgagee also.

The question for determination is whether the lease in favour of the petitioner by the mortgagor having been granted while the suit on a mortgage was pending is hit by the doctrine of *lis pendens* and cannot, therefore, prevail against the mortgagee decree-holder.

The very object of the enactment of section 65-A of T.P. Act seems to be to provide for rights which might prevail as against the mortgagee and therefore as against any auction purchaser in the mortgage suit also. To resort to section 52 of the Act and to hold that a lease created pending a suit on the mortgage would not be vaild as against the mortgagee even where the lease conforms to section 65-A does not seem to be coorrect. A lease created by a mortgagor in possession would always be valid as against him. There was hardly any need to enact section 65-A for that purpose. The very purpose of section 65-A of the Act should be deemed to be to provide for a right in the mortgagor to create a lease that would be valid under all circumstances and not merely against him. That is why salutary safeguards and limitations are placed on the powers of the mortgagor in creating a lease. Otherwise section 65-A has no meaning at all and, therefore, when a lease has been created in conformity with the section 65-A that must be held to be valid not merely as against the mortgagor, but also against the mortgagee. There is no contradiction with the principle embodied in section 52 of the Act in taking this view. The lessee in any case takes the lease subject to the mortgagee's suit. It is difficult to see how by holding that the lease will be given effect to even as against the mortgagee, the mortgagor's interests are in any way affected.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge, Chingleput, dated 17th August, 1968 and made in E.P. No. 95 of 1967 on his file (in C.S.No. 2 of 1962 on the file of the High Court (O.S.)).

K. Kumaraswami, P. Kannan and *H.N. Markandan*, for Petitioner.

B.R. Dolia of *M/s. Aiyar* and *Dolia*, for Respondent.

The Court made the following

ORDER.—This petition arises out of an order of the learned Subordinate Judge of Chingleput in E.P. No. 95 of 1967 (in C.S. No. 2 of 1962 High Court). The petitioner was the fifth respondent in the execution petition. The decree sought to be executed was on the foot of a mortgage. The mortgagor had, during the pendency of the suit on the mortgage which resulted in the mortgage decree sought to be executed, granted a lease of the mortgaged property in favour of the petitioner for a period of three years. The petitioner wanted his lease to be mentioned in the sale proclamation and this request having been refused, has filed the present revision petition.

The petitioner contended that he was not aware of the mortgage in favour of the decree-holder, that the lease in his favour was not collusive and that it was not hit by *lis pendens* and that as he had a subsisting interest in the property, it had to be disclosed in the sale proclamation. The other facts are not necessary for the purpose of this case. The only question is, whether the lease in favour of the

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* C.R.P. No. 1861 of 1968. 24th February, 1969.

petitioner by the mortgagor having been granted while the suit on a mortgage was pending is hit by the doctrine of *lis pendens* and cannot, therefore, prevail against the mortgagee decree-holder.

The Calcutta High Court in *Md. Juman Mia* v. *Akali Mudiani*[1], and the Bombay High Court in *Ramadas Popat* v. *Fakira Pandu*[2], have held that such a lease would be hit by the doctrine of *lis pendens*. On the other hand reliance is placed by the petitioner on the decision in *Namashya* v. *Chohan Ram*[3]. In the latter decision the Supreme Court does not directly deal with the question whether a lease like the one under consideration would be hit by *lis pendens*. The decision, however, contains discussion of the law prior to the enactment of section 65-A of the Transfer of Property Act in 1929. At that time, there were two conflicting views on this question one view was that mortgagors in India remained the owners and when in possession could *prima facie* exercise the rights of ownership inclusive of the power to grant leases of the mortgaged property; the other view being that a mortgagor in possession might grant a lease conformable to usage in the ordinary course of management but was not competent to grant a lease on unusual terms or authorise the use of land in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. It is this conflict which was sought to be resolved by the enactment of section 65-A of the Transfer of Property Act. That section contains very salutary principles sufficient to safeguard the rights of a mortgagor and gives effect to the second of the views above set forth rather than the much more liberal view which is first mentioned. As pointed out by the Supreme Court at page 403:

> "The mortgagee is not normally bound by the acts of the mortgagor with reference to the mortgaged property:
>
> 'But if a mortgagee takes his security with knowledge of the purposes to which the land is applied and allows the mortgagor to remain in possession he will be bound by the acts done by the mortgagor in accordance with the usual course.......... Consequently, if the mortgagor after he has granted the mortgage, deals with the property in the usual course of management the interest created by him may be rightly deemed operative against the mortgagee.' "

There is nothing to show that in this case the mortgagor has dealt with the property except in the usual course of management. It was further stated in the above decision that the mortgagor would in the usual course of management create a tenancy from year to year in the case of agricultural land or from month to month in case of property consisting of houses and his dealings with the mortgaged property in the usual course of management would be operative against the mortgagee. This was again emphasised at page 404 of the report by further adding that it is not competent to the mortgagor to grant a lease on unusual terms, or to alter the character of the land or to authorise its use in a manner or for a purpose different from the mode in which he himself had used it before he granted the mortgage. All these discussions were relevant in the case before the Supreme Court because their Lordships were concerned with the mortgage created in the year 1926. But after the enactment of section 65-A of the Act, these considerations are not relevant and as I have already mentioned that section provides for salutary safeguards for the protection of the mortgagor's interest. Therefore, the only question that still remains is, whether the fact of a suit on the mortgage being pending in any way affects the right of the mortgagor in possession to grant a lease consistent with the provisions of section 65-A. In this case, there is no doubt that the lease in favour of the petitioner has been granted conformably to the provisions of section 65-A. Is there anything in section 52 of the Act which would compel this Court to hold, as has been held by the Calcutta and Bombay High Courts, that such a lease will not hold good against the mortgagee? (The Bombay High Court realised that as the lease under consideration by them was created after section 65-A of the Act was enacted, it would have to be investigated whether the lease fell within the

1. A.I.R. 1943 Cal. 577.
2. A.I.R. 1959 Bom. 19.
3. (1952) S.C.J. 553: (1953) 1 M.L.J. 12: A.I.R. 1952 S.C. 401.

powers of mortgagors under that section if it had not been a lease which was created *pendente lite*. But it was not necessary to go into that question in that case because the question had to be decided upon the doctrine of *lis pendens*). The reasoning of the Bombay High Court is as follows at (pages 20 and 21):

> "It is quite true that the petitioner purchased the interest of the mortgagor as well as the second mortgagee at the auction sale, and if that was all that he had purchased then, it could be said that holding the lease good as against the petitioner would not affect the interest of the mortgagee. But what an auction purchaser purchases at a sale upon a mortgage is not only the interest of the mortgagor or the interest of any subsequent mortgagees who have been made parties to the suit, but also the interest of the mortgagee who has brought the property to sale. The petitioner, therefore, had in him both the interests of the mortgagor and the mortgagee after his purchase, and if the lease in favour of opponent No. 1 is held good as against him, then, in that case, the result must necessarily be that Madhava's (mortgagee's) rights in the property, which were the subject-matter of the suit, would be affected."

> "But it seems to us that that does not affect the question of *lis pendens*. The question whether one party to a suit had or had not got a right to enter into a transaction does not affect the question of *lis pendens*. A mortgagor, for example, may, pending a suit filed by the mortgagee, convey the equity of redemption to anybody he likes. He may similarly create a second mortgage. The only things which he cannot do is do these things in such a manner as to affect the first mortgagee. If he does create a second mortgage, or if he conveys the equity of redemption, then the second mortgagee or the purchaser takes subject to the result of the suit. That is because once a suit is filed, section 52 prohibits one party to the suit to effect a transfer which he could have done, if the suit had not been filed, not absolutely, but in such a manner as to affect the rights of the other party to the suit. It seems to us, therefore, that if section 62 is to be allowed to have full effect, it must be decided that any lease, which is created by a mortgagor pending a suit which was filed by the mortgagee, would not be binding upon the mortgagee, or any person who has subsequently purchased the interest of the mortgagee along with that of the mortgagor in the property in suit, and the lessee will have to take subject to the result of the suit."

Of course, the lessee has got to take subject to the result of the suit. But that would only mean that instead of being the mortgagor's lessee, he would become a lessee of the mortgagee, if the mortgagee happens to become the auction purchaser in Court sale or of any other auction purchaser of the mortgaged property. The Bombay High Court though it does not say so, seems to have been unduly influenced by the consideration that in the case before it, the lessee became, under the provisions of section 3 (*a*) of the Bombay Agricultural Tenancy Act, a protected tenant. That is hardly a relevant consideration. It might very well be argued that when section 65-A of the Transfer of Property Act permits a lease to be granted only in conformity with the provisions of that section, the provisions of another Act like the Bombay Agricultural Tenancy Act would not have effect of conferring upon the lessee the rights larger than that which the mortgagor was competent to create under section 65-A of the Transfer of Property Act. But that does not mean that the lease created in conformity with that section would not be valid because a suit on the mortgage itself might be pending. The very object of the enactment of section 65-A, seems to me to be to provide for rights which might prevail as against the mortgagee and therefore as against any auction purchaser in the mortgage suit also. To resort to section 52 of the Act and to hold that a lease created pending a suit on the mortgage would not be valid as against the mortgagee even where the lease conforms to section 65-A does not seem to be correct. A lease created by a mortgagor in possession would always be valid as against him. There was hardly any need to enact section 65-A for that purpose. The very purpose of section 65-A of the Act should be deemed to be to provide for a right in the mortgagor to create a lease that would be valid under all circumstances and not merely against him. That is

why salutary safeguards and limitations are placed on the powers of the mortgagor in creating a lease. Otherwise section 65-A has no meaning at all and, therefore, when a lease has been created in conformity with the section 65-A that must be held to be valid not merely as against the mortgagor, but also against the mortgagee. There is no contradiction with the principle embodied in section 52 of the Act in taking this view. The lessee in any case takes the lease subject to the mortgagee's suit. It is difficult to see how by holding that the lease will be given effect to even as against the mortgagee, the mortgagor's interests are in any way affected. The considerations that were relevant before the enactment of section 65-A of the Act are no longer relevant and the question whether the mortgagor can create a lease with any limitations no longer arises. I am of opinion, therefore, that the lease in this case should be held to be valid even as against the mortgagee. The real difficulty with the Bombay decision seems to be that the Bench has been subconsciously influenced by the considerations which were relevant before the enactment of the section 65-A of the Transfer of Property Act. With due respect to the learned Judges, I do not share their view and I am of opinion that as long as a lease created by the mortgagor in possession is in conformity with the provisions of section 65-A of the Act it would hold good against the mortgagee, even though it was created during the pendency of a suit by the mortgagee.

The Civil Revision Petition is allowed and the sale proclamation will include a reference to the lease in favour of the petitioner.

V.M.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Tirumurthi Transports (P.) Ltd., Udumalpet .. *Petitioner**

v.

The Regional Transport Authority, Coimbatore .. *Respondent.*

Constitution of India (1950), Article 226—Remedy under—If could be availed of when the remedy provided under the statute has not been availed of—Proceedings in regard to permits under Motor Vehicles Act—Delay in filing writ—If could be excused.

Where a statutory authority passed an order in relation to a matter exclusively committed to its jurisdiction, the remedy provided for by that statute against such order must be pursued. The fact that a person has not availed himself of that remedy and has allowed the same to be barred by limitation is no ground or justification for allowing him to seek the remedy under Article 226 of the Constitution.

Similarly where a person complains against any order of a Transport Authority he must seek the remedy of a writ with utmost promptitude to protect his interest, if any, which is purely individual to him, as against the public interest sought to be served by the order of the Transport Authority. A delay of 60 days, although due to ignorance of law, cannot be excused in such circumstances.

Petition under Article 226 of the Constitution of India praying the High Court to issue a writ of *certiorari* calling for records from the respondent relating to endorsement No. 10873/B-1/68 and to quash the same.

M. Kalyanasundaram, for Petitioner.

The Court made the following

ORDER.—This is a petition under Article 226 of the Constitution of India, for quashing certain proceedings of the Regional Transport Authority, Coimbatore, dated 11th June, 1958. These proceedings related to the proposal to open a new route as Udumalpet to Coimbatore *via* Poolankinar, Erishnampatti, Challappam-

* W.P. No. 542 of 1969. 24th February 1969.

balayam, Thondamathur, Somathur, Pollachi and Kinathukadavu and to fix the number of buses to be introduced on that route. The Regional Transport Authority approved the proposal and fixed the number of bus as one. The petitioner admits in paragraph 7 of the affidavit filed in support of this petition that an appeal is available against the said order to the State Transport Appellate Tribunal, but he had not filed the appeal because prior to this, the petitioner has not preferred any appeal against section 47 (3) orders and as such he was not aware of the limitation. The substance of this plea is one of ignorance of law as justifying his not filing an appeal and coming to this Court straightway. Even here, the writ petition is supported by an application for excusing a delay of 60 days. Under these circumstances, the question for consideration is whether I should in the exercise of my discretion, admit this writ petition overlooking the fact that the petitioner had not availed himself of the alternative remedy of filing an appeal and has filed this petition 60 days beyond time.

I am of the opinion that in such matters where the statutory authority passes an order in relation to a matter exclusively committed to its jurisdiction, the remedy provided for by that statute must be pursued and the fact that a particular person has not availed himself of that remedy and allowed the same to be barred by limitation is no ground or justification for allowing him to approach this Court under Article 226 of the Constitution of India. So also, in relation to the delay of 60 days. I am of the opinion that in matters like this, where a person complains against any order of the Transport Authority, he must come to the Court with the utmost promptitude. His only grievance, shorn of legal technicalities, is that if another bus is put on the route, the petitioner will lose a part of the profits which he is earning by virtue of competition; on the other hand, the object of the authority is to provide additional transport facilities to the travelling public or to provide new transport facility where there is none. If that be the case, in the light of such rival considerations, a person who feels aggrieved by the order of the Transport Authority should come to this Court with the utmost promptitude for the protection of his interest which is purely individual and peculier to him, as against the public interest sought to be served by the order of the authority.

Under these circumstances, in the exercise of my discretion, I decline to admit this writ petition both on the ground that the petitioner has not availed himself of the alternative remedy available to him and on the ground that there is delay in approaching this Court. Hence this petition is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

The Union of India owning the North Eastern Railway by its General Manager .. *Petitioner**

v.

Messrs. Sakthi Textiles by its partner, K. A. Markandu .. *Respondent.*

Railways Act (X of 1890), section 78-B—Claims for compensation for loss of consigned goods—Limitation of six months—Date of commencement —Date of delivery of goods for transit—Not the date from which the goods were to be delivered to consignee—Reply by Railway without prejudice to their rights—No inference of waiver of limitation.

The consignor booked the goods for transit by Railway on 28th August, 1963 and delivered the goods. Finding that the consignee never reported delivery, he wrote to the destination station master on 31st December, 1963 anclosing the relevant railway receipt and asking that the goods may be re-booked back. This letter was never acknowledged by the station master. On 14th May, 1964 the consignor made a formal claim to the Chief Commercial Superintendent:

* C.R.P. No. 2157 of 1967 7th March, 1969.

who sent a reply without prejudice to the rights of the Railway. On the question of bar of limitation under section 78-B of the Railways Act,

Held; The claim is barred under section 78-B of the Railways Act. The language in section 78-B is explicit in terms, that the relevant date must be the date when the 'goods were delivered to be carried by railway.' It cannot be reckoned from the date when the goods were to be delivered to the consignee.

Where the reply of the Railway Administration was to the effect that further enquiry will be made, on certain documents being received, but that was without prejudice to the legal rights of the Railway Administration, that would definitely preclude an inference of any waiver of limitation.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsiff, Erode (Pr. 1) dated 12th April, 1967 and passed in S.C.S. No. 699 of 1966.

S. K. L. Ratan, for Petitioner.

C. Harikrishnan, for Respondent.

The Court delivered the following

JUDGMENT.—The only point involved in this revision petition is a very short question of limitation relating to section 78-B of the Indian Railways Act, 1890.

The admitted facts are that the consignor booked the goods in question, for transit by the Railway, on 28th August, 1963, and delivered the goods for such transit at Erode, the destination being Ahimanpur in North India. We have no means of ascertaining whether the goods ever reached the destination, Ahimanpur, or not. But the consignor, finding that the consignee never reported delivery, wrote a letter on 31st December, 1963 to the Station Master at Ahimanpur, enclosing the relevant railway receipt, and asking that Station Master to re-book the goods back to Erode. This letter was never acknowledged by the Station Master, and, apparently, no action was taken thereon. On 11th April, 1964 and 25th April, 1964, the consignor wrote further letters to the same Officer, but they were in vain. Ultimately, on 14th May, 1964 the consignor made a formal claim to the Chief Commercial Superintendent, and there was a letter in reply to the effect that the further records, if any, might be sent for investigation, but that the reply was *without prejudice* to the rights of the Railway. Ultimately, after notice under section 80, Civil Procedure Code, the suit was instituted for recovery of the goods valued at below Rs. 250. The defence that I am now concerned with, is the plea of the bar of limitation under section 78-B.

On the facts, as stated above, the bar would clearly appear to be applicable. It is impossible to take any other date, as the date of delivery of the goods to be carried by the Railway Administration, within the meaning of section 78-B, sub-clause (*a*), except the date 28th August, 1963. In this connection, learned Counsel for the respondent has relied on a decision of the Division Bench of the Assam High Court in *Amarchand* v. *Union of India*[1], where the learned Judges have expressed the view that the limitation could conceivably be also reckoned from the date when the goods were to be delivered, or were delivered, to the consignee. I find it extremely difficult to accept this interpretation, since the language of section 78-B is explicit in its terms, that the relevant date must be the date when the "goods were delivered to be carried by railway". A further condition of difficulty here, is that we have no means whatever of ascertaining whether the goods ever reached Ahimanpur at all. The suggestion of learned Counsel for the respondent is, that the goods must have reached Ahimanpur, and that the Station Master at Ahimanpur probably utilised the railway receipt which was sent to him by the consignor to seize the goods and to convert them to private use. This is a conjecture, pure and simple ; there is no iota of evidence in the record, on which any such inference could be supported. For the moment, I am concerned with this aspect, only to

1. A.I.R. 1955 Assam 221.

show that the date which is relevant to section 78-B sub-clause (*a*), on the facts of this case, can only be 28th August, 1963 and could be no other date.

That much being conceded, it would be obvious that the limitation under section 78-B expired on 28th February, 1964. Since the notice, Exhibit A-3 was on 14th May, 1964, the suit would be barred. It is not in dispute that under section 140 of the same Act there are requirements, stated in detail, for service of notice of claim on the Railway administration, and, there are notification published by the railway concerning the authorities to whom any such demand, enquiry or claim could be made. In the present case, on the facts, prior to 14th May, 1964, there was no notification of claim or complaint or enquiry, either within the meaning of section 78-B itself, *or the proviso to that section*, to any one who could validly represent any of the Railway Administrations, involved, under the Rules. The inference is, therefore, inescapable that, strictly, as a matter of law applicable to the facts, the claim is time barred.

But learned Counsel for the respondent further contended that this is a case in which it should be held that there has been a waiver of the plea of limitation, under circumstances, similar to those in *South Indian Co-operative Stores* v. *Union of India*[1], where the learned Judges came to the conclusion that there had been a waiver. It is stated that this decision has also been approved in a subsequent decision of the same High Court. But, unfortunately for the respondent, this is not a case in which the Chief Commercial Superintendent contented himself merely with a reply that the claim was not valid on the merits, without any reference to the plea of limitation, as in the Calcutta case. This is a case in which the reply is to the effect that further enquiry will be made, on certain documents being received, but that was *without prejudice* to the legal rights of the Railway Administration. That definitely precludes, in my view, any inference of any waiver of limitation on the facts of this case.

For these reasons, the revision petition by the Railway will have to be allowed, and the decree in the Small Cause suit will have to be set aside, as the suit was barred by limitation.

Having said so far, I must add that this is eminently a case in which the Railway should meet the actual value of the goods which are untraced or untraceable, as a matter of public policy, and as a matter of the obligation of the Railway to the citizen who consigned the goods through the Railway. The Railway is a legal entity, like any similar organisation, and is entitled to all defences at law, including a plea of limitation. But, as carriers, the Railway Administrations have specific obligations, both under the common law and under special enactments, to safeguard the goods entrusted to them for transit, with reasonable diligence to deliver them to the consignee and, if there has been delay, to take note of the correspondence from the consignor, and take due action thereon. In this vital aspect, there would appear to be some negligence, in this case, at least on the part of the subordinate Railway officials concerned, such as the Station Master of Ahimanpur, to whom the Railway Receipt was sent by the cosignor by registered post. It is difficult now to ascertain what has happend to the goods, but, obviously, they are untraceable. The actual value of the goods is not an appreciable amount, and, in any event, it does not exceed about Rs. 220 or Rs. 230. This is eminently a case in which the loss sustained should be made good by the Railway Administration, though, on principle, I must upheld the technical plea of limitation argued in this case.

Parties to bear their own costs throughout.

V.S. *Petition allowed.*

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1. A.I.R. 1957 Cal. 17.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

The Thiruchankattankudi Tenants Co-operative Farming Society by its liquidator .. *Petitioner**

v.

Sri Rudrapathiswaraswami Devasthanam, Thiruchankattankudi, by its Hereditary Managing Trustee .. *Respondent.*

Madras Co-operative Societies Act (LIII of 1961), section 89—Bar of suit under—Scope of—"Touching the affairs of the society"—Meaning of—Co-operative Farming Society in liquidation—Suit for arrears of rent against the society without leave of Registrar—If maintainable.

Section 89 of the Madras Co-operative Societies Act bars the institution or continuation of legal proceedings against a registered society when once the society enters upon liquidation. The policy behind the section is the same as the one behind similar provisions in the Companies Act or in the Law of insolvency. A claim made or which is pending when a society is wound up cannot be proceeded with in a civil Court. The 'affairs of the socierty' referred to in the section will embrace also a claim or liability against the society. Hence a suit for arrears of rent due by a co-operative farming society, in liquidation, cannot be proceeded with without the prior sanction of the Registrar.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the Sub-Court, Nagapattinam, in O.S. No. 2 of 1968.

K. S. Naidu, for Petitioner.

T. R. Srinivasan and *K. Ramamurthi*, for Respondent.

The Court made the following

ORDER.—This petition is directed against an order of the Subordinate Judge of Nagapattinam by which he rejected the defendant's contention that the suit does not lie without leave of the Registrar, in view of section 89 of the Madras Co-operative Societies Act, 1961. The respondent who is the plaintiff sued the petitioner Co-operative Farming Society, for recovery of a large sum of money as arrears of rent due from it for Faslis 1373 and 1374. The society is one registered under and governed by the provisions of the Madras Co-operative Societies Act, 1961. The basis for the claim was, as stated in the plaint, that the plaintiff had leased out to the society an extent of 305 acres on a rental of 3029 kalams of paddy and 458 bundels of straw per year, and that the defendant having entered into possession failed to pay the arrears of rent. It was also mentioned that eviction proceedings were instituted against the society before the Authorised Officer. While those proceedings were in progress, the society abandoned 35.44 acres. Subsequently, the Authorised Officer made an order for eviction on the ground of default in payment of rent.

Among the defences, one was that the suit did not lie without leave of the Registrar and for this objection, reliance was placed on section 89 of the Madras Co-operative Societies Act, 1961. In repelling the contention, the Subordinate Judge considered that the affairs of the society, for purposes of section 89, would amount only to domestic affairs of the society and would not cover a claim such as in the suit.

I have no hesitation in holding that this view cannot be supported. Section 89 provides for bar of legal proceedings, when a society enters upon liquidation; and the policy behind the section is the same as the one behind similar provisions in the Companies Act or in the insolvency legislation. A claim made or which is pending when a socierty is wound up cannot be proceeded with in a civil Court. Section 48 of the old Act of 1932 contained a similar provision. The affairs of

* C.R.P. No. 1341 of 1968. 7th March, 1969.

the society in my view, will certainly embrace a claim or liability against the society.

Mr. T. R. Srinivasan raised a preliminary objection that the revision petition does not lie and he sought reliance on *Pichu Aiyangar* v. *Ramanuja Jeer Swamigal*[1]. The Division Bench of this Court in that case never held that a revision does not lie; but all that was pointed out in that case was that, in an appeal arising out of the decree in the suit itself, it would be open to the Division Bench considering the appeal to go into the propriety of the order passed by a single Judge of this Court under section 115, Civil Procedure Code. There is, therefore, no substance in the preliminary objection. Mr. Srinivasan then said that, if the suit is dismissed under section 89, his client should have a remedy. There can be no doubt, I think that, in that event, the plaintiff can certainly lay claim before the Registrar, who is bound to consider the same and meet out the claim in accordance with the exigencies of the winding up.

The order of the Court below is set aside and the petition allowed. The Court below is directed to give a reasonable time to the plaintiff to apply to the Registrar of Co-operative Societies for leave to pursue the suit, and if leave is granted, to try the suit and dispose of the same in due course. There will be no order as to costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

The Union of India represented by the Secretary, Ministry of Communications, New Delhi, and another .. *Appellants**

v.

S. Narayana Iyer .. *Respondent.*

Telegraph Act (XIII of 1895), section 7 and Indian Telegraph (Amendment) Rules, 1966 *and Constitution of India* (1950), *Article* 19—*Telephones Department—Public Utility—Installation charges and call charges of telephones—Enhancement—Fixation of rates—Principles—Powers of interference by Courts—Scope of—Unreasonable and oppressive tariff—Violation of fundamental rights—Liable to be struck down—Bundle of rights possessed by a subscriber—If constitutes 'property' within the scope of Article* 19 (1) (*f*).

Statute—Interpretation—Rule making power—Delegation—Extent and validity.

The impugned tariff cannot be struck down or interfered with and the charges now levied cannot be termed as unreasonably high, exhorbitant or colourable device and so outside the power conferred under section 7 (3) (*a*) of the Indian Telegraph Act. Nor is any fundamental right of the subscriber shown to be adversely affected by the rise in rates.

The department of Telecommunications (Telephones) which is a limb or branch of the Union Government is a 'Public Utility' conducted by the State upon a commercial basis.

The charge made by such Public Utility, in respect of the service or the supply concerned is essentially a rate or a tariff of rates. The Tariff is almost always determined by process of delegated legislation. The Department is entitled to a reasonable return on the rate-base, applying all refinements of the economic theory to the determination of this rate. The Organization may be entitled to a reasonable return on investment, to part-apporpriation of the surplus for capital expansion and to the employment of all modern accounting.

Interference on the grounds relating to subordinate legislation or on grounds relating to Fundamental rights, would appear to be exhaustive of the powers judicial review in regard to the Tariff.

1. (1940) 1 M.L.J. 882 : I.L.R. (1940) Mad. 901.

* W.A. No. 490 of 1968. 28th March, 1969.

Section 7 of the Act empowers the Central Government to make rules consistent with the Act. Under section 7 (2) (*a*) the rules which are made under the section could provide for the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted.

Section 7 (5) provides a statutory safeguard, of placing the rules before Houses of Parliament. It is under this delegated power that the tariff has been fixed under rule 434.

Section 7 cannot be held to be *ultra vires*. There is no excessive delegation *per se* under section 7 or an abdication of essential legislative function or the bestowal on the subordinate authority of an arbitrary or uncanalised power. The Legislature is here making provision for the conduct of a very vital public utility owned by the State as a monopoly and conducted as such, namely, the telephone and telecommunication. The rules themselves provide elaborately for the several component elements of the rates in accordance with the well known economic principles of rate regulation. There is hence no vice of excessive delegation in the Act itself or in the Rules *per se*.

What is not a reasonable rate of tariff is question of fact. That depends upon a break up analysis of the statistics of the gross income and expenditure, and the several heads into which the surplus has been classified, and finally what would be the return of net profits, and would it be within reasonable limits. If the tariff imposed can be so justified it is no function of the Court to reassess the tariff on merits and to make some other rate. Even if on the view that on a measure rate system the present tariff could well admit of some reduction which may be in the public interest, that would be a matter for agitation before the concerned bodies or on the floor of legislature.

But if the tariff on actual analysis is found to be inordinate, unreasonable or oppressive then it is liable to be struck down on the doctrine of *ultra vires*. It would amount to a colourable exercise of the power, as the intendment of the Legislature should clearly be interpreted as the bestowal of the power in order to fix reasonable rates. It would also be a case of the agency to which the power has been delegated, exceeding the ambit of the delegation and therefore not acting within the law in enforcing such a tariff.

Under Article 19 (6) as amended by the Constitution (First Amendment) Act, 1961, the declaration of a State monopoly in respect of any trade or business, has to be presumed to be reasonable and in the interests of the general public in the context of the rights guaranteed under Article 19 (1) (*g*). The effect of the amendment is it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19 (6) and would inevitably have to satisfy the test of reasonableness.

The bundle of rights held by a subscriber will constitute ' property ' within the meaning of Article 19 (1) (*f*). The bundle of rights include a lease of material things or an apparatus, with rights of user and enjoyment therein and also a right to service, all of which rights have economic value and could be evaluated as such.

Whether it be that of the State Department, or it is the balance-sheet of any private company, exhibited as profit and loss account, there is invariably ascertainable or ascertained surplus from which any appropriation can be made, and is often made, towards self-financing invariably it is only after this is done, that there is an item of appropriation shown for the rate of return or dividend, whatever it might be termed. Again it is difficult to accept that the Department is in error in allowing a particular figure for depreciation, or in not following the British practice in making an allocation of 60 per cent. and 40 per cent as between a Revenue expenditure and capital expenditure even with regard to gross working expenses. With regard to the cost of replacement, the Department appears to make an allowance for increasing cost due to inflationary trends and what the

cost is likely to be in future as a necessary component of a scientific estimate for depreciation. The Court cannot determine that these principles are erroneous in their application. It could be argued that there is at least a relative enhancement contemplated and enforced at a time when the Department does not appear to be in financial difficulties. But this seems mainly to be due to the future needs of expansion. This is not merely a growing Department but if it is to be retained as static, and not permitted dynamic growth, it may well affect the industrial potential of the country, and, indirectly, the entire economic progress of the Nation itself.

Case-law discussed.

Appeal under Clause 15 of the Letters Patent against the Order of the honourable Mr. Justice Venkatadri dated 14th November, 1968 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2122 of 1966 presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the second respondent herein from enforcing the revised Telephone tariff as per the Indian Telegraph (Amendment) Rules, 1966.

S. Mohan Kumaramangalam with *V. Sureshan*, for the Central Government Standing Counsel, for Appellants.

T. R. Mani, for Respondent.

The Court delivered the following Judgments :—

Anantanarayanan, C.J.:—This appeal is instituted by the Union of India, represented by the Secretary, Ministry of Communications, New Delhi, and the General Manager, Telephones, Madras from the judgment of our learned brother Venkatadri, J., in W.P.No. 2122 of 1966, striking down the recently enhanced Telephone tariff. I might immediately state that the entire Judgment proceeds upon two bases, or comprehensive considerations, both of which have now become academic, or inapplicable. Firstly, in striking down this enhancement of the tariff the learned Judge was largely influenced by the fact that the increased revenue, thereby secured, was sought to be utilised to cover the deficits in the Posts and Telegraph Department. The learned Judge thought that this was illegitimate and inadmissible. To quote :

"The Posts and Telegraphs Department consists of various units, such as postal, telegraph, radio and telephone units. Each department or wing is a separate unit by itself, with regard to personal or service conditions, or management or supervision. The units are not interconnected, intervined or interlaced with each other".

For this reason, the learned Judge considered that there was no nexus of integration, following *D.C.M. Chemical Works* v. *Its workmen*[1], between the sections of the Posts and Telegraphs Department and Telephones, and hence that this vitiated the levy altogether. This matter has now become strictly academic, in the light of the developments before us in the arguments of both learned Counsel, particularly of Sri Kumaramangalam for the appellant. Sri Kumaramangalam has contended that this perspective of approach is redundant, even if it be conceded as not erroneous. He contends that the Department of Telephones (appellant) is a public Utility Undertaking, which, in this country, is a State-owned monopoly under Article 19 (6) (*ii*) of the Constitution of India. The regulation of its Tariff is, or ought to be governed by principles, which are evident in the various decisions of American Courts, where this branch of the law has reached fullest development. Both on these very principles, and on the principles on which judicial Review of subordinate legislation is permissible, since it is conceded that the Rule embodying the enhancement is made under a Statute and placed on the table of the Houses of Parliament, in terms of the Rules itself, the enhancement is perfectly justified, and not liable to be struck down. When he can show this, according to the argument and show that the rates of return on the 'Rate Base' are very reasonable, and within limits ranging from 3 and 4 per cent upto 8 per cent, on the Mid-term Capital Investment, the further argument of the learned Counsel is that, whether the amount is

1. (1962) I L.L.J. 385.

to be utilised ultimately to cover deficits in the Posts and Telegraphs Department, or to reduce the burden on the taxpayer, by crediting to General Revenues is quite, academic.

The other base or foundation of the judgment of the learned Judge (Venkatadri, J.) is a related one, that this tariff is a 'fee' and not a tax, governed by the principle of the levy of 'fee' to be deduced from such authorities, as *The Commissioner, Hindu Religious and Charitable Endowments* v. *L.T. Swamiar*[1], *Hingir Rampur Coal Co.* v. *State of Orissa*[2] and *India Sugars and Refineries Ltd.* v. *Municipal Council, Hospet*[3]. But it is now clear beyond doubt, from a careful study of the record and from the very arguments submitted in the appeal, that what we have here is a Rate or Tariff of Rates, imposed by a State-owned Public Utility Corporation ; it is certainly not a 'fee', in the restricted sense, for the element of *quid pro quo* cannot exhaust its content. Such a Corporation, according to the authorities, is entitled to charge a tariff, which would include a reasonable return on the 'Rate base', or the Mid-term Capital Investment. Such a Corporation is equally entitled to make provision for; expansion of capital or 'self-financing', as it has been termed in the treatises, it is entitled to appropriate sums towards dividends for subsidies by Government, from General Revenues, if made, before the return is determined. We have permitted an amendment of the pleadings, in the formal sense, to enable these arguments to be pressed before us. The consequence has inevitably been, that the entire appeal has been argued upon a somewhat different level by learned Counsel on both sides.

Sri T.R. Mani, for the respondent, who has submitted arguments on these aspects, at considerable length, has sought to convince us that, assuming without conceding, what we have here is a Tariff of Rates charged by a Public Utility, and not the mere imposition of a 'fee', and also that the utlimate utilisation of the net return to cover a deficit in the Posts and Telegraphs Department may be irrelevant, if the return is reasonable, nevertheless, the return, on the facts and figures, is extortionate, oppressive or unreasonable. His further contentions are that we have here a species of Subordinate legislation, and the Tariff is liable to be struck down on this score, as constituting a fraud on power, and as an instance of the delegatee (here the Government) exceeding the statutory mandate altogether. He has also sought to argue that the Fundamental Rights of the respondent, under Articles 19 (1) (*g*) and 19 (1) (*f*) are involved by the increase, and are injuriously affected. This is the main outline of the contentions in the appeal.

As this is the first instance, or almost the first instance, that the matter of Judicial Review of Rates imposed by a State-owned Public Utility Corporation comes up before this Court, I do not think that any apology is necessary for dealing with the relevant aspects in this judgment, in some detail, though I have also sought to be as terse, in the required analysis, as possible. For the sake of convenience, the judgment itself is divided into the following main sections :

(1) *Public Utilities* : Tariff or Rate Regulation and legal developments in the United States.

(2) *Judicial Review*—Subordinate Legislation, and the Telephone Tariff.

(3) Fundamental Rights, and the impugned Telephone Tariff.

(4) The merits of the appeal.

Public Utilities :—Tariff or Rate Regulation and legal developments in the United States.—It has been very cleary established, in the arguments submitted by learned Counsel on both sides, that the Department of Tele-communication (Telephones) which is a limb or branch of the Union Government, now the appellant before us, is a 'Public Utility' conducted by the State upon a commercial basis. Since the very concept, and the development through legal process of the rights and obligations of such Public Utilities, whether state-owned or private, in relation to the consumer-

1. (1954) S.C.J. 335: (1954) S.C.R. 1005: (1954) 1 M.L.J. 596: A.I.R. 1954 S.C. 282.
2. (1961) 2 S.C.R. 537: A.I.R. 1961 S.C. 459.
3. (1942) 2 M.L.J. 663: I.L.R. (1943) Mad. 521.

class of the public, stem from the United States, no apology is necessary for elaborating the development in that country. Amidst a plethora of treatises and precedents, placed before us by the assiduous efforts of learned Counsel, I am here making a judicious selection of certain of the authoritative treatises and the precedents, which in my view, best illuminate the somewhat intricate aspects of the subject. I have been all the more persuaded to devote time and effort to such a venture, for the reason that this is perhaps the first case in the Madras High Court, in which Judicial Review of the enhancement of tariff by a Public Utility is centrally in focus.

At the outset, I might refer to the very valuable study on the subject, in the Encyclopaedia Britanica, Volume 18, page 744-B. The Author defines 'Public Utilities' as 'a designation for a special grouping of industries." In his opinion, they have to be distinguished from State services or public works, supported by taxation, and equally from industrial or commercial undertakings comprehended under the term 'private business.' But, Public Utilities, properly so-called, need not be privately owned. The essential feature of the tariff or rates charged by these Utilities, is that " they sell their services at prices which are not fixed in the open market, but are Governmentally fixed." The Writer classifies those services as services of transportation, services incidental to transportation, services facilitating communication, those facilities providing power, light, heat and refrigeration, and those providing water-supply and sanitation in urban or rural communities. From an economic point of view, the concept itself is made up of two ideas; "(*a*) The idea, of monopoly and (*b*) The idea of common necessity."

With regard to social control of Public Utilities, the Writer commences this part of the Essay or Article, by a reference to the famous decision of the U. S. Supreme Court in *Munn* v. *Illinois*[1], which is the landmark commencing the significant part of the development of case-law. Chief Justice Waite, upholding the validity of the Illinois statute fixing the maximum rates for storing grain in elevators, referred to business which had become " affected with a public interest, and had ceased to be *juris privati* only." That was a citation from Lord Chief Justice Hale, who had penned it some 200 years earlier in England. This notion of 'public interest' was further elaborated by Chief Justice Taft of the U. S. Supreme Court in the recent case of *Charles Wolff Packing Co.* v. *Court of Industrial Relations of the State of Kansas.*[2]

As the Writer observes, where freedom of choice is seriously restricted, public interest arises in proportion as equality of opportunity to choose is restricted, and if the wants supplied are recognised as a common necessity, the concept of Public Utility is taken as established. In the United States, regulation was originally accomplished by suits at law, where the common law duties and rights of such Utilities were applied in specific cases. Later, there has been legislation, by means of Charters or Franchises and, still later, legislatively by means of the exercise of the Federal power. When legislative regulation largely supplanted judicial regulation, the function of the judiciary has been restricted to review of legislative and administrative acts. I shall devote some space, a little later, to the obligations of Public Utilities and to the most essential characteristics of Rate Regulation.

I may next refer to the *corpus juris secundum*, Volumes 73 and 86. In volume 73, we have Articles on the 'definition and nature' of Public Utilities, 'rights and duties' of Public Utilities, the concepts underlying service to the public, and a separate section upon what vitally concerns us in the present case, namely, 'Rate and Rate-making.' Where this aspect was originally effectuated by suits in Court, based on the Common Law notion of a business 'affected with a public interest,' and therefore constrained by an obligation to charge only a reasonable rate, later, there was a virtual superseding process of legislative authority, or an administrative body functioning under delegated legislation. Courts were then left with the protective power of judicial Review. One essential feature of the tariff was the "*rate base*" namely " valuation of property devoted to the public

1. (1876) 94 U.S. 113. 2. (1923) 262 U.S. 522.

use, on which the utility is entitled to receive a fair return." Reasonableness of the rate, therefore, also depends on whether it yields a fair return on such a base. In the United States, where the Public Utilities are largely administered by Private organizations, derived as a mandate from a Charter or an enactment, we find that much of the case-law centres round what has been termed 'confiscatory rate,' the organisations contending before Courts, that the rate was so low as to inhibit a fair return on the 'rate-base' and, hence, confiscatory. The rule is often expressed in the form that the rate "must not be so low as to be confiscatory, or so high as to be oppressive."

In *corpus juris secundum*, Volume 86, there is a special study on tele-communications, including telephones, as Public Utilities, and a discussion of the 'rate base,' 'return and rate of return' and allowances for expenses and depreciation, when the process of rate-regulation is at work. These treatises have some relevance, with regard to select passages, to the discussion, at a later stage, whether the Department entitled to utilise an appreciable part of the surplus towards capital improvement, expansion of facilities, and capital works.

At this stage, I may refer to one treaties containing an unusual discussion, namely, Glaeser's "*Public Utilities in American Capitalism*" (1957 Edition), Macmillan Company, New York. This Author claims that Public Utility regulation grew out of the general matrix of Governmental regulation 'until it developed certain procedures and objectives which are characteristically its own." According to him, this entire development from the Common Law, can be traced to its roots in the very ancient ideal of social justice which, "as applied to economic life by the early Church Fathers, became their very famous doctrine of *justum pretium*, i.e., 'just price'" This was opposed to the then contemporaneous doctrine of *verum pretium*, namely, *natural price*. In other words, where compelling necessities left the Government without power, such as a food famine, the trade was only entitled to a just price, and not to the price dictated by competition. It was this idea, that the individual customer was in a position of dependence and required protection, which led Lord Hale to make this famous statement in his treatise *De Portibus Maris*:

"..........duties must be reasonable and moderate, though settled by the King's licence or charter. For now the wharf and crane and other convenience are affected with a public interest, and they cease to be *juris privati only*."

The exposition by Lord Hale, was the foundation, in 1887 of *Munn* v. *Illinois*[1], Before proceeding to three other treatises, it may be convenient to note leading American decisions, which have been placed before us, stemming from *Munn* v. *Illinois*[1].

In *Missouri Ex Rel. S. W. Bell T. Co.* v. *Public Service Commission*[2], a return of 5½ per cent. upon the minimum value of the property of a public telephone corporation was considered wholly inadequate as a reasonable return on 'rate base' as the prevailing investment and interest rates were much higher. In *Wolff Packing Company* v. *Court of Industrial Relations*[3], there is a discussion about the categories of business 'clothed with a public interest justifying some public regulation.' But the extent to which regulation may go, varies with the kind of business. In *Bluefield W.W. & Improvement Co.* v. *Public Service Commission*[4], it was laid down that a Public Utility was entitled to such rights as will permit it to earn a return upon the value of the property employed "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings, which are attended by corresponding risks and uncertainties. But such an utility was not entitled to a return, realised or anticipated "in highly profitable enterprises or speculative ventures." Six per cent. was considered too low to constitute just compensation, for supplying a city with water.

1. (1876) 94 U.S. 113.
2. 67 L. Ed. 981.
3. 67 L. Ed. 1103.
4. 67 L. Ed. 1179.

In *Chicago and Grand Trunk Railway Company* v. *Thomas Wellman*[1], we have an action in damages for alleged excess fare charged to a passenger, and the question was with regard to the propriety of the items included as operative expenses. The Court observed (at page 180).

> "While the protection of vested rights of property is a supreme duty of the Courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by exorbitant and unreasonable salaries, or in some other improper way, transfer its earnings into what it is pleased to call '*operating expenses*.'"

The pertinence of this to the matter now before us is obvious, if the respondent is justified in his analysis of the balance-sheets and figures, as a basis for his claim that there has been a fanciful or improper diversion of the surplus to certain heads of account, of the nature of capital expenses or capital for expansion, in order to demonstrate a low rate of return, as a justification for the enhanced tariff.

In *Federal Power Commission* v. *Natural Gas Pipeline Company*[2], the Commission found that 6½ per cent. was a fair return on rate base allowed. The Court held that the Commission was not bound to permit a higher rate. In *Wisconsin* v. *Federal Power Commission*[3], the Court held, with regard to certain spiral escalation clauses in the contract, that "if the increase is challenged, the producer must still establish its lawfulness, wholly apart from the terms of the contract." This, again, exemplifies and illustrates the mutual rights and obligations as between a Public Utility, whether State-owned or by a private company, and the consumer, as a relevant section of the public, with regard to the tariff or rates.

I shall now proceed to refer to extracts from the main treatises. Here, I confine myself, in the interests of brevity, to the most pertinent passages in the leading treatises; if the entire matter placed before us is to be reproduced, or even a generous cross-section of it, that might fill a volume and, moreover, would be redundant, or even obscuring in its effect.

In Halsbury's Laws of England (Third Edition), Volume 7, page 302, there is a reference to the right to take tolls and dues, and it is stated that the charge "must be for the public advantage and reasonable in amount." In the same Volume at page 322 (Para 685), there is reference to a grant for the Public Utility, "and there is a *quid pro quo* to the public." All such dues must be fair and moderate;" "otherwise, the franchise will be void."

In Willoughby on the Constitution of the United States, Second Edition Volume 3, page 1701, there is a section on the reasonableness of the rates charged by Public Utilities, following *Munn's case*[4]. Whether the rates are fixed by the Legislature, or fixed by Commissions, acting under legislative mandate, the criteria are the same, and there is no distinction. In the same work, but in Volume 2, at page 820, there is a section on general considerations, which are applicable with regard to reasonableness of rates. In a certain sense the Courts in America would appear to be more restricted in their power of Judicial Review in this matter, than Courts in our country. The ground for this is that such Public Utilities were, largely conducted by Private Corporations, acting under Franchise, Charter or Statute; they appealed to the Court and, later, to Commissions legislatively authorised, against what are termed "confiscatory rates" which do not ensure a fair return. But, when the prescription of specific rates become distinctly a legislative function, the Courts held that, except where the rates were so extortionate and oppressive, as to constitute a fraud on power, the Courts ought not to interfere. To cite a passage:

> "A rate so low as to be deemed by the Courts to be confiscatory is unconstitutional..........the Legislature cannot, constitutionally, deny to the Courts the jurisdiction to examine whether the legislatively fixed rate is of this character.

1. 36 L. Ed. 176.
2. 86 L. Ed. 1037
3. 10 L. Ed. 357.
4. (1876) 94 U.S. 113.

But, as to the reasonableness of rates above the minimum that would be confiscatory, the Legislature is the sole judge." (Page 826).

In Willis on "Constitutional Law" (1936 edition) page 758, there is an analysis of the subject of "Business affected with a Public Interest."; the Author then proceeds to give the legal history of the Public Utility concept. He points out that the broad criteria are that there is an obligation to serve without discrimination, furnish adequate facilities, and to charge only reasonable rates.

In *Allnut* v. *Inglis*[1], we have a very early statement of Lord Ellenborough, Ch.J. of the doctrine of Lord Hale, that warehouses claiming monopoly under Crown grants, must charge only reasonable hire.

In Phillips "The Economics of Regulation" (1965 edition), page 55 *et seq* the case-law is discussed at some length. In "*Public Utility Economics*" by Garfield and Lovejoy, after an elaborate discussion of the rate-base, in relation to Supreme Court decisions, we have the following valuable summary of seven working rules, for rate-making purposes, by the appraisal process :—

1. Taking an inventory of the physical property................
2. Costing the inventory thus determined.
3. Adding an amount for overhead construction costs.
4. Deducting from the gross valuation of the physical property, as thus found, an amount for accumulated depreciation.
5. Adding an amount for the value of land.
6. Adding an amount for intangible values.
7. Adding an allowance for working capital.

In "Public Investment Criteria" by Marglin, (1967 edition), page 91, the Author refers to reinvestment as a factor in settling price policies, and states that "the rate at which benefits are reinvested, bears on the effectiveness of public investment." This has relevance to the argument of Mr. Kumaramangalam for the appellant (Department) that, from the surplus, a deversion to expansion of facilities and reinvestment, or ploughing back part of the revenue into the capital programme, is not merely justified and sound sense, but also essential in the public interest.

In the "Working of the Public Sector," Papers offered at a seminar and edited by V. V. Ramanatham (1964) the Author while on the financing of public enterprise, asserts that, in the United Kingdom, there is a large scale practice of ploughing in of profits for the sake of expansion or development. He sounds a cautionary note that, under democratic planning, this source is likely to be dried up by too much heeding to such slogans as that there should be 'no profit-no loss.' or 'better wages' and 'greater amenities.' In "The Public Sector in India" by Nabagopal Das (1966 edition), the Author points out (page 81), that ploughed back profit is an important source of capital for an enterprise. In "Rottschaefer's Handbook of American Constitutional Law" (1939 edition), page 482, there is a reference to the power of the State to protect the consumer against excessive prices, because of the Common Law doctrine of a reasonable price, stemming from *Munn* v. *Illinois*[2].

What are the broad propositions that can be deduced from this conspectus of the authorities and precedents on the American development, which has necessarily to be brief? I should enunciate them as follows :—

Proposition (1)—Public Utilities may be State-owned, or conducted by private companies on Charter, Franchise or Statute; in any event, that makes no essential difference to their character, their duties, and their obligations. Public Utilities are of several kinds; in a modern Welfare State, tele-communications, inclusive

1. (1810) K.B. 12 East 527.
2. (1876) 94 U.S. 113.

of telephones, undoubtedly constitute one vital category of Public Utilities. The two distinguishing characteristics are: (1) Monopoly whether total or almost total, either inhering in the State, or a Corporation; (2) the essential need of the Public, or a large section of the Public, for the enjoyment of the service or utility, as part of the economy of a Welfare State. Since these entities are, beyond doubt, affected, with a public interest, they are in a class apart. Their rights, their obligations, and the power of Courts in judicial review over the tariff charged by them, are all outgrowths from the Common Law and precedents.

Proposition (2)—Such Public Utilities must provide service without discrimination, and provide adequate facilities, further without withdrawal from the obligation to serve the public; the public, on the other hand, have the legitimate obligations imposed on them by the regulations governing the consumer of the Utility.

Proposition—(3) The charge made by such Public Utilities, in respect of the service or the supply concerned, is essentially a *rate* or a tariff of rates. It is important to notice that, as the State of Monopoly Characterising such Public utilities excludes competitive, fixation of prices, whether these Utilities are owned by Government or are private, the tariff is almost always determined by a process of delegated Legislation. The very concept of a *rate* brings in several distinctive features. It is not merely a 'fee whatever the nomenclature, may be for *it is not exhausted by the quid pro quo element* though that is essential. On the other hand, the Department is entitled to a reasonable return on the ratebase, applying all refinements of the economic theory to the determination of this rate. The organization may be entitled to a reasonable return on investment, to part-appropriation of the surplus for capital expansion, and to the employment of all modern accounting techniques with regard to depreciation, reserve, sinking fund, etc. The *quid pro quo* element is also essential, if there is a monopoly, and the consumer is being deprived of the benefits of competition.

Proposition—(4) For this reason, while the rate can be reasonable, it can never be extortionate or oppressive. The Department is not entitled to speculative profits, or to rates of return disproportionately high, as compared with returns on investments in other fields of economic activities then prevalent. The monopoly cannot be misused to fleece the consumer, served by the Utility; nor can the statistics be juggled with, in order to mask an undue profits-return in thin guises of reduction of return-percentage by artificial heads of appropriation or expenses.

Proposition—(5) The power of judicial review by the Courts, particularly where the actual tariff is determined by some process of subordinate legislation, as in this case, is conceivably wider than the power of the Courts in the United States, but is still restricted. In terms of subordinate legislation, as I shall presently show, the power is limited by the broad principles of *ultra vires*, a colourable exercise of the rate-making function, or the delegatee altogether exceeding the ambit of the delegation. Certainly, the statute *itself* could be struck down, for an abdication by the Legislature of the essential and inalienable core of legislative power, or for a wholly unguided and arbitrary delegation; but that is not the argument here.

Proposition—(6) Equally, the Tariff is liable to interference in judicial review, where it impinges on the Fundamental Rights of the citizen, and is injurious to any such right, whether it is under Article 14, or Article 19 (1) (*g*) or Article 19 (1) (*f*). I shall separately analyse these problems, relative to Fundamental Rights, in the context of the telephone tariff in this case. But these two aspects, namely, of interference on the grounds relating to subordinate legislation, or on grounds relating to Fundamental Rights, would appear to be exhaustive of our powers of judicial review. In our Jurisdiction under Article 226 of the Constitution, we cannot be called upon to function as a rate-making body, on the merits of a particular tariff; nor would there appear to be any residual Common Law power, in the exercise of which we can re-determine such rates.

Judicial Review—Subordinate Legislation and the Telephone Tariff.—Before proceeding into this analysis, I would like to refer to the relevant provisions of the Indian Telegraph Act, XIII of 1885, as modified upto 1st February, 1963, and the Rules made thereunder. This is for the important reason, that theoretically speaking there can be an attack upon the part of the statute itself, which empowers the subordinate legislative process, if it amounts to a total abdication of the legislative function, or be tows upon the authority empowered to fix the tariff (here, the Government), a totally arbitrary, uncanalised and unguided power. It is perhaps a little unfortunate that this statute, which was enacted in 1885, has not been thoroughly recast or modified, in essential parts, in regard to its phraseology, so that it might be brought up-to-date, in tune with modern ideas of delegated legislation. However, section 7, as it stands, empowers the Central Government, from time to time, by notification in the Official Gazette to make rules consistent with the Act, for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under the Act (as the statute is amended, this will include telephones as part of the tele-communications). Under section 7 (2), the rules which are made under the section could provide for (*a*) the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted. Section 7 (2) (*h*) also refers to the persons who may be made liable for " the rates, charges and fees mentioned in this sub-section ". Section 7 (5) which is important, as it provides a statutory safeguard of a certain kind, for the rule fixing the tariff, is to the following effect :

" Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

It is under this delegated power that the tariff has been fixed, and this will be clear from a perusal of rule 434, and the sub-heads thereunder. Though, as I stated earlier, the argument is not sought to be pressed that section 7 itself is *ultra vires*, and not merely the rule embodying the tariff made thereunder, it is necessary, at this stage, to refer to the authorities on this important aspect of judicial review.

These authorities will be found reviewed, at some length, in *Delhi Municipality* v. *B.G.S. & W. Mills*[1]. After referring to the fact that the question as to the limits of the permissible delegation of legislative power by a Legislature to a subordinate authority, came up before the Supreme Court, in a number of cases, their Lordships first referred to the *Delhi Laws Act case*[2]. This laid down that the legitimacy of the delegation depended upon its being utilised as an ancillary measure, which the Legislature considered necessary for the efficient exercise of its legislative function. The essential legislative function must be retained by the Legislature, and not itself delegated to any subordinate authority. That must at least consist of the determination of the legislative policy and its formulation, as a binding rule. *Raj Narain Singh* v. *Chairman, Patna Administration Committee*[3], also emphasised that there could be no delegation of the essential legislative function or feature. *Harishankar Bagla* v. *State of Madhya Pradesh*[4], upheld section 3 of the Essential Supplies (Temporary Powers) Act, 1946, as not unconstitutional delegation. *Western India Theatres Ltd.* v. *Municipal Corporation of the City of Poona*[5], was a case in which it was claimed that there was unconstitutional delegation, as the Legislature had totally abdicated its function, and delegated power to the Municipality to determine the nature of the

1. (1969) 1 S.C.J. 621 : A.I.R. 1968 S.C. 1232.
2. (1951) S.C.J. 527 : (1951) S.C.R. 747 : A.I.R. 1957 S.C. 332.
3. (1954) S.C.J. 166 : (1955) S.C.R. 290 : (1954) 2 M.L.J. 344 : A.I.R. 1954 S.C. 569.
4. (1954) S.C.J. 637 : (1955) 1 S.C.R. 380 : (1954) 2 M.L.J. 211 : A.I.R. 1954 S.C. 465.
5. (1959) S.C.J. 390 : A.I.R. 1959 S.C. 586.

tax to be imposed on the rate-payers, and "that power was unguided, uncanalised and vagrant. The delegation was upheld by the Supreme Court, as the obligations and functions were sufficiently defined. *Hamdard Dawakhana* (*Wakf*), *Lal Kuan* v. *Union of India*[1], is an interesting case as, in the impugned provision, the Legislature had established no criterion or standard upon which the particular disease or condition could be segregated, for being dealt with in respect of advertised remedies. *Vasantlal Maganbhai Sanjanwala* v. *State of Bombay*[2], re-affirms the responsibility of the Legislature in the matter of delegation. *Jyoti Pershad* v. *Administrator for the Union Territory of Delhi*[3], is of some importance, as the Supreme Court held that, so long as the policy and purpose of the enactment had been indicated by the Legislature, "the mere fact that the legislation was skeletal" or that every detail was not indicated, did not amount to excessive delegation, or the bestowal of unguided discretion. The last case referred to was *Devidas Gopal Krishnan* v. *State of Punjab*[4]. The other cases discussed are *Powell* v. *Apollo Candle Do.*[5] *J.W. Hampton* v. *United States*[6], and *Corporation of Calcutta* v. *Liberty Cinema*[7].

I am referring to these cases, because of a possible argument here that section 7, that I have earlier set forth, is the bestowal upon Government of an uncanalised and unguided power, arbitrary in its content, and therefore subject to the vice of excessive delegation, or an abdication of legislative function. The decision in *Hamdard Dawakhana* v. *Union of India*[1], has been stressed before us for the observation that the subordinate agency may be given a discretion but that "the discretion should not be so wide that it is impossible to discern its limits. There must instead be definite boundaries within which the powers of the administrative authority are exercisable. Delegation should not be so indefinite as to amount to an abdication of the legislative function."

In *T.B. Ibrahim* v. *Regional Transport Authority*[8], there is a distinction made between a by-law and a rule made under a rule making power, conferred by a statute. In the present case, we are confronted, not with a by-law, but with a instance of a rule made under the rule-making power. In *Subba Rao* v. *Income-tax Commissioner*[9], the doctrine of *ultra vires* with regard to subordinate legislation has been referred to by Viswanatha Sastri, J. If a statutory rule is validly made, it has precisely the same effect, as if it were a part of the Act. Mr. Kumaramangalam contends, in consequence, that the tariff rule in the present case has to be regarded by us, as if it is a part of the Act, But, even so, it is clearly liable to be assailed, with regard to the powers of judicial review, on the following grounds : (1) The statute itself is unconstitutional in respect of the delegation. (2) The exercise of the power is colourable, or, in other words, it amounts to a fraud on the power ; this will vitiate the rule (3). The delegatee has wholly gone beyond the power, and that would also render the rule *ultra vires*, even if the statute is unassailable.

That these are the broad, and undoubted principles will be clear, from the entire passage on "Control of Statutory Instruments by the Court" in Craies on Statute Law, Sixth Edition, page 306. (*Carltona, Ltd.* v. *Commissioners of Works*[10], has been referred to there, as Lord Greene, M.R., laid down therein the limit of interference by Courts. The Court can only see that the power is within the four corners of the endowment by the Legislature, and to see that the power is exercised in good faith. The Court cannot substituted its judgment or assessment for that of the authority, which has been empowered to act. There is a reference here to an expression like "As if enacted in this Act", which is not to be found in the case before

1. (1960) S.C.J. 611: (1960) 2 S.C.R. 671 : (1960) 2 M.L.J. (S.C.) 1: (1960) 2 An.W.R. S.C. 1; (1960) M.L.J. (Cr.) 358: A.I.R. 1960 S.C. 554.
2. (1961) 1 S.C.R. 341: (1961) 1 S.C.J. 394: A.I.R 1961 S.C. 4.
3. (1962) 2 S.C.J. 58: (1962) 2 S.C.R. 125: A.I.R. 1961 S.C. 1602.
4. (1969) 1 S.C.J. 19 : (1969) 1 I.T.J. 224 : A.I.R. 1967 S.C. 1895.
5. 10 A.C. 282.
6. 72 L.Ed. 624.
7. (1965) 2 S.C.R. 477: A.I.R. 1965 S.C. 1107.
8. (1953) S.C.J. 31: (1953) S.C.R. 290 : (1953) 1 M.L.J. 205: A.I.R. 1953 S.C. 79 at 82.
9. (1951) 2 M.L.J. 424: A.I.R. 1952 Mad. 127.
10. (1943) 2 All E.R. 540.

us. That expression was examined, at some length, in *Institute of Patent Agents* v. *Lockwood*[1]. But it is unnecessary for our present purpose to proceed into the ramifications of the law here. Certainly, such a clause is not to be found in the statute now under consideration. But, instead, there is a statutory safeguard in section 7 (5), which makes it mandatory that the rule of the revised tariff should be placed on the table of both the Houses of Parliament, and that it is subject to modification or even total cancellation, if the Parliament so desired. It is only if nothing is done, that the rule becomes effective as formulated. This safeguard is referred to in Maxwell on "Interpretation of Statutes" (Eleventh Edition), page 49. But it is not necessary for us to distinguish between this safeguard, and the safeguard of a provision "as if enacted in this Act", earlier referred to. The rule is a statutory rule, and the intendment is that, to all effects and purposes, it is to be read as part of the Act. There is some kind of check, upon the exercise of the delegated power in some oppressive or arbitrary manner, in the requirement that the rule must be placed on the table of the Houses of Parliament, for the requisite period. (*Vide* the decision: *D.S. Garewal* v. *State of Punjab*[2]. I may also refer here to Halsbury's Law of England (Third Edition), Volume II, page 490, in regard to 'Judicial Control'. At page 491 the doctrine of *ultra vires* is discussed with regard to subordinate legislation. Finally, I may refer to the famous dictum of Lord Shaw in *R.* v. *Halliday*[3], which is the quintessence of the doctrine:

> "The author of the power is Parliament; the wielder of it is the Government. Whether the Government has exceeded its statutory mandate is a question of *ultra vires* or *intra vires*, ... In so far as the mandate has been exceeded, there lurk the elements of a transition to arbitrary Government and therein of grave constitutional and public danger".

It is certainly not possible to hold, upon the arguments submitted before us, that section 7 itself is *ultra vires*, though I would repeat what I stated earlier about the regrettable absence of a total re-drafting of this Act, of 1885, in the light of modern legal concepts and requirements. But, in the context of the discussion of regulation by Judicial review, or otherwise, of the rates of tariffs determined by a Public Utility owned by the State, it becomes very clear that there is no excessive delegation *per se* under section 7, or an abdication of essential legislative functions, or the bestowal on the subordinate authority of an arbitrary or uncanalised power. On the contrary, section 7, and its sub-sections cannot be torn apart from the Act, and interpreted in isolation, as standing apart from the Act and the complex of the Rules. The Act and the Rules have to be reaa as a whole, and, indisputably, when this is done, the legislative intent is manifest and undeniable. The Legislature is here making provision for the conduct of a very vital Public Utility, owned by the State as a monopoly and conducted as such, namely, the telephone and tele-communications. It is in that context that the Government is given the delegated power to make rules for the rates and charges. The rules themselves provided elaborately for the several component elements of these rates, to which detailed reference must be made when dealing with the *measure rate system*, which is now in vogue for telephone installations. This implies that this is an ancillary function, which is delegated, subordinate to the power taken by the Legislature to make a monopoly of this Utility, and to make the Government responsible for the conduct of the monopoly. Part II of the Act, namely, sections 4 and 5, relate to the exclusive power of the Government in this regard, and the entire Act is thus the creation of a Public Utility, which is State-owned, in the interests of the public. Nor can it be argued that the power is arbitrary and uncanalised, for there is no bestowal of an unlimited power to charge any price. The Act and the Rules make it clear that the power is to fix the rates as *telephone tariff* in accordance with the well-known economic principles of rate regulation, and the levy of reasonable rates. There is, hence, no vice of excessive delegation in the Act itself, or in the Rules *per se*.

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1. (1884) A.C. 347.
2. (1959) S.C.J. 399 : (1959) 1 S.C.R. 792: A.I.R. 1959 S.C. 512 at 518.
3. L.R. (1917) A.C. 260.

But, certainly, the particular rule, which is now impugned, may have to struck down, if the guidelines, already indicated by the case-law, have been exceeded, and what we have here is not a reasonable tariff with provision for a reasonable return on the rate base, but some tariff, which is unreasonable, inordinate and oppressive ; from the point of view of legal theory, and, apart from semantics, I would consider these terms to be equivalent. They appear to have been so treated in the American precedents. Of course, what is not a reasonable rate of tariff, is a question of fact. That depends on a break-up analysis of the statistics of the gross income and expenditure, and the several heads into which the surplus has been classified, and, finally, what would be the return of net profits, and would it be within reasonable limits. If the tariff imposed can be so justified, it is no function of this Court to reassess the tariff, on the merits, and to make some other rate. Even if we were of the view that, on the *measure rate system*, the present tariff could well admit of some reduction, which may be in the public interest, that would be a matter for agitation before the concerned Bodies, or on the floor of the Legislature. But, if the tariff, on actual analysis, is found to be inordinate, unreasonable or oppressive, then it is liable to be struck down, on the doctrine of *ultra vires*. It would amount to a colourable exercise of the power, as the intendment of the Legislature should clearly be interpreted as the bestowal of the power in order to fix reasonable rates. It would also be a case of the agency, to which the power has been delegated, exceeding the ambit of the delegation and, therefore, not acting within the Law in enforcing such a tariff. Upon this purely legal aspect, Mr. Kumaramangalam has no different proposition to urge. He would merely reiterate that where, as in this case, the rule has been made, to all intents and purposes, as though it were a part of the Act, and the precaution has been taken of laying the rule on the table of the Houses of Parliament, for the requisite period, we must not substitute our assessment and judgment, if the tariff could be reasonably maintained, for that of Government. The law thus being clear, it remains for me to proceed to analyse the actual merits of the tariff, in order to determine the issue, whether there has been an inordinate or oppressive fixation or enhancement of the rates.

Fundamental Rights and the impugned Telephone Tariff :—Sri Kumaramangalam does not dispute the broad proposition that if, by the enhancement of the rates, which is the subject-matter of the proceeding before us, the Fundamental Rights guaranteed under the Constitution are injuriously affected, that would be justiciable and that the Rates or the Tariff may have to be struck down for that reason. For instance, with regard to the right guaranteed under Article 19 (1) (*g*), it is not in dispute that if the Rates are determined, even by a process of subordinate legislation, in such manner as to injure the freedoms guaranteed under this Article, our jurisdiction could be invoked, and redress obtained. It becomes immediately relevant to state that Article 19 (6) was amended by the Constitution (First Amendment) Act, 1951, so that, as the Article now stands, the declaration of a State monopoly in respect of any trade or business, has to be presumed to be reasonable and in the interests of the general public in the context of the rights guaranteed under Article 19 (1) (*g*). The leading decision on this aspect is *Akadasi* v. *State of Orissa*[1]. Gajendragadkar, J., (as he then was) observed that the theory underlying the Amendment, in so far as it related to the concept of State monopoly, did not appear to be based on the pragmatic approach, but on the doctrinaire approach accepted by Socialism. Hence, the declaration of State monopoly, in respect of a trade or business, has to be presumed to be reasonable, and in the interests of the public, and that would apply to a Public Utility, like tele-communications, including telephones.

Of course, that does not imply that the rates imposed on consumers, in the conduct of such a monopolistic organisation by the State, are wholly immune from judicial Review. With regard to the question, what precisely was implied by 'A law relating to' a monopoly, the expression used in the Amendment, the Supreme Court observed as follows (at page 1054) :

1. (1964) 2 S.C.J. 37 : A.I.R. 1963 S.C. 1047.

In our opinion, the said expression should be construed to mean the law relating to the monopoly in its absolutely essential features. If a law is passed creating a State monopoly, the Court should enquire what are the provisions of the said law which are basically and essentially necessary for creating the State monopoly. It is only those essential and basic provisions which are protected by the latter part of Article 19 (6). If there are other provisions made by the Act which are subsidiary, incidental or helpful to the operation of the monopoly, they do not fall under the said part and their validity must be judged under the first part of Article 19 (6). In other words the effect of the amendment made in Article 19 (6) is to protect the law relating to the *creation* of monopoly and that means that it is only the provisions of the law which are integrally and essentially connected with the creation of the monopoly that are protected. The rest of the provisions which may be incidental do not fall under the latter part of Article 19 (6) and would inevitably have to satisfy the test of the first part of Article 19 (6)".

This exposition of the law makes it clear beyond doubt, that the enhancement of telephone tariff could well be the subject of attack, with reference to the rights guaranteed under Article 19 (1) (*g*), and the scope of reasonable restriction embodied in Article 19 (6).

In the present matter, however, though theoretically the position is clear, the question is largely academic. The writ petitioner is a subscriber to a telephone, purporting to be injured by the enhancement. But, all that he has claimed is that, since his retirement, he is a Director in a business concern : consequently, certain of his activities have a bearing upon the use of tele-communications, part from his strictly private living. But, as Sri Kumaramangalam has stressed, he is not a business-complex, which can claim that its Fundamental Right to carrry on its trade is injuriously affected by the enhancement ; nor is he a business concerned in the utilization of the tele-communications or telephone installations on a large scale, either directly or indirectly. The far more important and interesting question in this case, whether the rights of a subscriber, in respect of the installation and the service rendered, will constitute 'property' within the meaning of Article 19 (1) (*f*) of the Constitution, so that, if the enhancement does not amount to a reasonable restriction on those rights, under Article 19 (5), the matter is justiciable from that angle. This takes us to a very interesting issue, which is at least of considerable academic significance, even if it be not strictly relevant, to a material extent, in the present case, whether the vital rights of a subscriber that we are now concerned with, will or will not constitute 'property' within the meaning of Article 19 (1) (*f*)?

We have heard some lengthy arguments upon this question. With reference to the available case-law, I propose to be brief, since many of the landmarks are well-known, but, on an analysis, I shall show that it is practically indisputable that this bundle of rights held by a subscriber will constitute 'property' within the meaning of Article 19 (1) (*f*) of the Constitution. Definitions of 'property' are very difficult and, perhaps, should be avoided. Both Bentham (Theory of Legislation) and Cooley (Constitutional Law) appear to favour the description that "whatever a man produces by the labour of his hand or his brain, whatever he obtains in exchange for something of his own, and whatever is given to him, the law will protect him in the use enjoyment, and disposition of", as having the attributes of 'property'. In a volume of Studies entitled "Property relations in Independent India (Constitutional and Legal Implications), The Indian Law Institute," we find more than one Jurist accepting the expression to be comprehensive enough to take in all categories of property, movable or immovable, corporeal and incorporeal. In the Study by Professor Tewari, it is pointed out that when property is incorporeal, if any right, in the bundle of rights constituting such property, satisfies the test of acquisition, holding, and disposal, separately from the corpus, it would be 'property'. In *Kulanthaivelan Chettiar* v. *Muthu Chellappa Chettiar*[1], I was concerned with the unsatisfactory state of the Indian Law, in that

1. I.L.R. (1967) 3 Mad. 615.

section 3 of the General Clauses Act (X of 1897) defined 'immovable property' alone, and 'movable property' as 'property of every description except immovable property'. This left out of reckoning, altogether, that very valuable species of right, known as forms of incorporeal property, and a passage from Williams on Real Property (23rd Edition) was cited to show that 'property' could either denote an abstract right of ownership, or the object of a right of ownership, or valuable entities or rights which may be exchanged for the ownership of money. In Salmond on Jurisprudence (12th Edition), the broad division is "corporeal" and "incorporeal", corporeal property comprising land, chattels, and incorporeal property having two broad division, namely, *Jura In Re Propria* (Patents, Copyrights, Trade marks) and *Jura In Re Aliena* (or encumbrances), namely, leases, mortgages and servitudes. The development of the case-law in the Supreme Court, on this aspect, is highly significant, and the following brief summary of the leading precedents will suffice.

In *Commissioner, Hindu Religious Endowment* v. *L.T. Swamiar*[1], Mukherjea, J., observed that the word 'property' as used in Article 19 (1) (*f*), could be given a liberal and wide meaning, and, in that case, the office of Mahant was held to be 'property'. *Saghir Ahmad* v. *State of U.P.*[2], held that the right to ply motor vehicles for gain was an interest in a commercial undertaking, of the nature of 'property'. The controversy originated in the question, whether the guarantee embodied in Article 19 (1) (*f*) covered both abstract and concrete rights of property. In *Chiranjitlal Choudhry* v. *Union of India*[3], Mukherjea, J., pointed out that the freedom guaranteed was not merely that to acquire and possess but also the right to enjoy all the concrete rights which flowed from the ownership of property. A different note was struck in *State of West Bengal* v. *Subodh Gopal*[4], and there was an observation in the judgment of Sastri, C.J., that Article 19 (1) (*f*) dealt with the right to own property, and not the right to the property owned, which was strictly within the scope of Article 31. But, in the later case, *Commissioner, Hindu Religious Endowments* v. *Lakshmindra*[1], this statement in *Subodh Gopal's case*[4], was elucidated, as not amounting to any radical alteration of perspective, so that Article 19 (1) (*f*) applied equally to concrete as well as to abstract rights of property. It is a well-settled maxim of jurisprudence, on this part of the law, that "nothing can be subject of property which is not recognised by law to be such": *Dwarkadas* v. *Sholapur Co.*[5]. It follows that, if the law withdraws such a recognition, the thing ceases to have the attributes of property. It is for this reason that a citizen can be inhibited from having a right of property in a public office, or in liquor, or narcotics or smuggled goods. On the question whether a contractual right could be regarded as 'property' or not, the authorities appear to be inclined to the view that it would depend entirely on the further question whether such benefits under the contract could be acquired held, or disposed of. If that test can be satisfied, rights arising under a contract could well be 'property rights'. The following very brief summary of what could be accepted as 'property' and what may not be, would be here highly relevant.

The *Shebait* of an idol has a right of property in his office. A hereditary trusteeship has an element of property. But a mere custodian of property, such as a Tikait of the Nathadhwara temple, has no such right. *Govindalaji* v. *State of Rajasthan*[6]. Where a person is deprived of the right of *Bare Management of an institution*, Article 19 (1) (*f*) could not be invoked *Sidhrajbhai* v. *State of Gujarat*[7]. The interest of an allottee under the Evacuees Act, 1947, which arises from a statutory grant, is not property: *Amar Singh* v. *Custodian*[8]. An incorporeal right which cannot be alienated apart from the corpus, cannot be regarded as 'property', such as right of shareholders to elect Directors, or to apply for winding up : *Dwarkadas*

1. (1954) S.C.J. 335: (1954) S.C.R. 1005: (1954) 1 M.L.J. 596: A.I.R. 1954 S.C. 282 at 288.
2. (1954) S.C.J. 819: (1955) 1 S.C.R. 707: A.I.R. 1954 S.C. 728.
3. (1951) S.C.J. 29: (1950) S.C.R. 869.
4. (1954) S.C.J. 127: (1954) S.C.R. 587: (1954) S.C.A. 65.
5. (1954) S.C.J. 175: (1954) 1 M.L.J. 355: (1954) S.C.R. 674.
6. (1964) 2 S.C.J. 715: (1964) 1 S.C.R. 561: A.I.R. 1963 S.C. 1638.
7. (1963) 3 S.C.R. 837: A.I.R. 1963 S.C. 540.
8. (1957) S.C.J. 574: (1957) S.C.R. 801: A.I.R. 1957 S.C. 599.

v. *Sholapur Co.*[1], *Suryapal* v. *State of U. P.*[2]. The right to hold a land revenue free, has been held to be not 'property' within the scope of Article 19 (1) (*f*) : *Girijananda* v. *State of Assam*[3], and the rights of a bare licensee, where the licence is not coupled with a grant, are not property rights: *Shantabai* v. *State of Bombay*[4]. *Per Contra*, even a temporary or precarious proprietary interest, such as that of a mortgagee or lessee, is 'property' within the meaning of Article 19 (1) (*f*), and the test is not that the person advancing this right should hold the entire proprietary interest. Incorporeal rights can well be forms of property, including decrees of Courts, Patents, Copyrights and even choses in action.

It is in this context, and with this background of the development of the law, that we have to view the question, whether the rights of a subscriber in the telephone installations are not a species of property. In *Kulanthaivelan Chettiar* v. *Muthuchellappa Chettiar*[5], I have pointed out that, in English Law, a judgment debt is a chose in action, and is thus part of the property which is 'personalty.'

It is difficult to see how a bundle of rights, which a telephone subscriber has, in respect of the installation, would not come within the definition or description, as Sri T. R. Mani rightly points out. Sri Kumaramangalam also concedes that the rights of a telephone subscriber are really composite, and not a single entity. Actually, the telephone apparatus invariably belongs to the Department; but, once the subscriber has been admitted as such, and furnished with the instrument, he is entitled to its possession and enjoyment, so long as he pays the rents, and there is no disconnection for any of the grounds recognised under the Rules. As I have earlier pointed out, a Public Utility Corporation, whether State-owned or private, being monopolistic, has also certain obligations under the law, particularly in the form of service in equality and without discrimination, and non-withdrawal from such necessary service, unless, indeed, the monopoly itself is to be terminated, and the field laid open for competitive enterprise. Thus, there can be no possible doubt that, in respect of the instrument, the subscriber is the lessee of movable property, with certain rights and obligations. But, even in this material sense, there is another component. There is a part of the *Matrix* or *Exchange*, which is segregated for the lines connecting this particular instrument with the *Exchange*, and the subscriber has an exclusive lease right, to this part of the mechanism of the *Exchange*, so long as he contnues to be a subscriber. The other element of the bundle of rights is, admittedly, the service or facility given, by which the subscriber is thus able to contact millions of other subscribers, who are possessed of telephones. Thus, the two broad divisions of this bundle of rights are (1) a right to hold and enjoy the instrument and the part of the *Matrix* or *Exchange*, to which it is linked up, which constitutes some kind of lease and (2) the right to the actual service, which may be over-widening, as the Department expands. We have been taken through the Rules and the Forms, and we have no doubt whatever that the rights are heritable. There is a Form to be used (Form No. 28) by the heir or heirs of the subscriber, for transfer of the telephone on production of the death certificate and other documents. No doubt *inter vivos*, a subscriber cannot transfer the telephone to another, except as expressly authorised by the Department. But, admittedly, another subscriber can be brought in, as an extension from the same connection or building, and there is also the '*own your telephone* Scheme', which certainly does not amount to the acquisition of full proprietary rights, but does involve the grant of a preference for an installation, on acceptance of the terms and payments under the Scheme. All this can lead to only one conclusion, namely, that the bundle of rights here includes a lease of material things or an apparatus, with rights of user and enjoyment therein, and also a right to service, all of which rights have economic value, and could be evaluated as such. It appears to me to be indisputable, as on the earlier discussion, that these rights of a subscriber would amount to 'property' within the meaning of Article 19 (1) (*f*).

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1. (1954) S.C.J. 175 : (1954) S.C.R. 674 : (1954) 1 M.L.J. 355 : A.I.R. 1954 S.C. 119.
2. (1952) S.C.J. 354 : (1952) S.C.R. 1056.
3. A.I.R. 1956 Assam 33.
4. (1958) S.C.J. 1078 : (1959) S.C.R. 265 : A.I.R. 1958 S.C. 532.
5. I.L.R. (1967) 3 Mad. 615.

In *Raja of Bobbili* v. *State of Madras*[1], Rajamannar, C.J., and Venkatarama Ayyar, J., dealt with the *Sholapur Mills case*[2], and pointed out that with regard to the word 'acquisition' of property, a reduction of the rent payable by a tenant to a landlord, would not be an acquisition by the Government of the property of the landlord. In the context of the American cases, the learned Chief Justice referred to the observations of Justice Brower in *Reagan* v. *Farmers' Loan and Trust Co.*[3], to the effect :

> "The Courts are not authorised to revise or change the body or rates imposed by a Legislature or a commission, they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable........ they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property..........."

Covington and L. Turnpike Railroad Company v. *Sandford*[4], is another decision referred to in this context, and an earlier case was quoted by the Court for the proposition that "the Courts will grant relief against legislation establishing the tariffs, which is so unreasonable as to practically destroy the value of the property." It is really unnecessary, for the present purpose, to review all the precedents. Where the monopoly declared is run by a private company, and if the rates are so low as to be confiscatory, Courts in the United States have interfered to give relief. Again, if the tariff is so high as to be virtually destructive of the concerned right in property, the matter would be justiciable, and the Court could interfere. The question will always be one of fact, whether the tariff is so inordinate and excessive as to constitute an injury to the bundle of the property rights possessed or held by the subscriber, to such a degree as to be virtually destructive of those rights, or a part of those rights. As I have earlier shown, if the tariff amounts to this, on clearer and stronger ground, it should be struck down as a colourable exercise of the delegated power, or on the principle of *ultra vires*, where the delegatee has altogether exceeded the statutory ambit of delegation.

The Merits.—I might immediately proceed to the merits, and it is here that great care is necessary to keep in mind, throughout, the nature of our jurisdiction, and the limits of that jurisdiction. At the outset itself, I may refer to the substance of the case of the petitioner as presented before us, by his learned Counsel Sri T. R. Mani, after obtaining very detailed instructions from his client, and a study of the entire relevant documentation. The question whether the deficiency or deficit incurred in the conduct of the Postal and Telegraph Services could properly be now made up by the enhancement of the tariff and the enhancement of gross revenue, thereby obtained, which loomed large before the learned Judge (Venkatadri, J.), has now become entirely academic. Sri Kumaramangalam has shown, from the documents, and without denial, that the Union Government is making very substantial contributions, each year, from General Revenues, namely, from taxes paid by millions of tax-payers who do not own telephones, for the capital development of telephones and tele-communications. Actually, the subsidy, in this sense, has amounted in one year to about thirty crores. On this aspect of the financing, by Government, of the capital expansion programme of the Department, the Government would appear to be clearly entitled to normal rates of interest on the contributed capital, from telephone revenue. No doubt, in the Fortieth Report of the Public Accounts Committee (1968-69), page 21, paragraph 1.31, there is an observation that "deficits in the Telegraph Branch should not be indefinitely borne by the Telephone Branch, irrespective of the amount and the circumstances"; but the observation itself is academic, in the present context Sri Kumaramangalam attempts to show that, on a proper analysis of the figures and the balance-sheets, it will be clearly demonstrable that the rate of return does not exceed 7 or 8 per cent. at the utmost. Sri Mani has shown that the British Postal Telephone System

1. (1952) 1 M.L.J. 174.
2. (1950) S.C.R. 869: (1951) S.C.J. 29.
3. 154 U.S. 361.
4. 164 U.S. 578.

has accepted 8 per cent. as a fair return on the 'Rate-base relative to mid-term capital investment.' If the argument of Sri Kumaramangalam is right, the question of the further utilisation of the return by the Union Government, in the form of covering the deficits in the Post or Telegraphic Branch, is really irrelevant. For that matter, the return could be taken into General Revenues, or could influence to diminish the burden of the general tax level. The crux of the argument, now developed, can really be expressed in the following form.

According to Sri Mani, the break-up analysis of figures placed before us, for 1965-66, 1966-67 and 1967-68, cannot be accepted. The major ground of distinction, to take the 1965-66 analysis, is the sum of 11.73 crores, shown by Sri Kumaramangalam as "cost of departmental works charged under petty and other works, and capital expenditure initially charged to revenue." Sri Mani, it has to be carefully noted, does not dispute the right of the Government's to undertake 'self-financing,' 'ploughing-back,' 'reinvestment' or capital expansion, so strenuously stressed by Sri Kumaramangalam, as the basis of the policy of the Department. Sri Mani would fully concede the general observations relative to this practice to be found in "Robson's Nationalized Industry and Public Ownership" under the head 'Self-financing of Development' at page 306, etc. It must be here stressed by us that the Government is diverting sizable amounts from General Revenues, as virtual subsidies, to this Department every year, in order to finance capital expansion. In addition to this, the Department is utilising a part of the surplus, in pursuance, of the same policy, and the sum of Rs. 11.73 crores, that I have just referred to, figures under this head, and, according to Sri Kumaramangalam, such deduction is strictly in consonance with the principles of accountancy and book-keeping, in respect of public utilities run on a commercial basis. If this is permitted, the net figure is 6.74 crores, inclusive of dividends to General Revenue as interest on borrowed capital. Even if the figure of 6.74 crores is itself taken as the return on the 'Rate-Base' of the capital outlay (mid-year), the percentage works out to 4.41 per cent. Similarly, for 1966-67, the percentage works out to 8.5 per cent., and for 1967-68 to 5.1 per cent. The point made by Sri Mani can be very simply stated in the following form. According to him, though such 'self-financing' may be legitimate, the return on the 'Rate-Base' has to be calculated "without making this deduction." He further contends that (1) the depreciation figure of 7.34 crores, for instance, for 1965-66 is excessive, as it is only 2 per cent. on buildings, and 4 per cent on installations, even according to the appellant. (2) The figure of 10.73 crores, for instance, includes the item of 8.82 crores for capital works, but without debiting the capital account the cost of labour in the construction and in minor capital works, which, according to him, are 'labour intensive' in character. Sri Kumaramangalam frankly concedes that an allocation of that kind is almost impossible. (3) Even as regards the general expenditure, the writ petitioner claimed to have obtained expert opinions from at least two Department in the United Kingdom to the effect that a 60 per cent. and 40 per cent. allocation, as between Revenue Works and Capital Works, is justified and desirable. If that is done, according to Sri Mani, and the return is calculated without making a deduction for 'self-financing' *before* determination of the return, the percentage works out to differing rates, between 19 per cent. and 23 or 24 per cent. Increase of the tariff, by the rates now sought to be enforced, in the context of such a return on the 'Rate-Base', is excessive, inordinate, and oppressive. As far as the consumer is concerned, it amounts to a fraud on power and, though Sri Mani would concede that the determination is by subordinate legislation, the rates should be struck down.

I have very carefully considered these arguments, and, in the end, I am left with the very clear impression that we cannot interfere with the tariff, under any principle of our Jurisdiction. As Sri Kumaramangalam has stressed, if the Department were to be conducted as a monopoly run by a licensee, as was originally the case, a very considerable part of the surplus would have to be utilised for payment of income-tax on the Revenue, and towards Royalty. When the State is administering the Department, these dues do not exist, but when the State is making capital

subsidies, in considerable measure, it would be entitled to dividends. The Extracts placed by Sri Kumaramangalam from Chapter I of the Report of the Telephone Tariff Revision Committee (1964 submitted in 1966), shows very considerable outlays towards capital development, which a private company may be in no position to undertake. Sri Mani has referred to Batliboi's Advanced Accounting, Chapter III, for the distinction between the Capital Account and the Revenue Account, and how it is a principle of accounting that "all expenditure which results in the acquisition of permanent assets" should be termed as Capital Expenditure, and these items are really chargeable to Capital Account. Actually it appears to emerge, as a very definite conclusion, in my view, that the crux of the matter is not the preference of one principle of book-keeping or accountancy, to another. Even if that were so, I find it difficult to conceive how the Court could interfere, unless, indeed, the Court is convinced that mere subterfuges are being resorted to by the Department, in order to mask a very highly remunerative return. The crux of the matter is, whether it be that of the State Department, or it is the balance-sheet of any private company, exhibited as Profit and Loss account, there is invariably an ascertainable or ascertained *surplus* from which any appropriation can be made, and is often made, towards 'self-financing' invariably, it is only after this is done, that there is an item of appropriation shown for the rate of return or dividend, whatever it might be termed. Again, it is difficult to accept the argument that the Department is in error, in allowing a particular figure for depreciation, or in not following the British practice in making an allocation of 60 per cent. and 40 per cent. as between a Revenue Expenditure and Capital Expenditure even with regard to gross working expenses. With regard to the cost of replacement, the Department appears to make an allowance for increasing cost due to inflationary trends, and what the cost is likely to be in future, as a necessary component of a scientific estimate for depreciation. How is this Court to determine that these principles are erroneous in their application?

It cannot be too emphatically asserted that this Court, in exercise of its power under Article 226 of the Constitution, does not function as a Commission in the United States, empowered to determine a tariff. Upon the facts of the record here, it is no mere administrative body that performs this difficult task, as part of the executive conduct of the Department. This tariff is, indisputably, the consequence of subordinate legislation and the result of the legislative process; it is placed on the table of the Houses of Parliament for the requisite period, and may be reviewed, modified, or cancelled by the Legislature. The question of the rates has been we find, very carefully examined, both by the Public Accounts Committee, and by the Posts and Telegraphs Tariff Enquiry Committee, the Committee of 1968, including as its head a non-official, Shri Mahavir Tyagi, and not merely a Departmental Chief, however eminent or notable. It could be argued, no doubt, that there is at least a relative enhancement contemplated and enforced, at a time when the Department does not appear to be in financial difficulties. But this seems, as far as our study indicates, mainly to be due to the future needs of expansion, as envisaged by the several Committees. This is not merely a growing Department, but, if it is to be retained as static, and not permitted dynamic growth, it may well affect the industrial potential of the country, and, indirectly, the entire economic progress of the Nation itself.

It is thus difficult to see how we could strike down, or interfere, with the tariff now in force, upon any principles on which Public Utility Rate Regulation has developed in the United States. This is all the more difficult here, as it has neither been shown how, as a kind of subordinate legislation, the rule is *ultra vires*, or colourable, nor how it injures the Fundamental Rights of the writ petitioner. Emphatically, it would be improper, within the scope of our power under Article 226 of the Constitution, to strike down the tariff, whatever individual opinions we might have of what should be the optimum Tariff, on a balance of the interest of the subscribers as against the interests of the Departmental growth, which ultimately benefits the entire Nation. In any event, we cannot graduate percentages, such as those shown in the balance-sheets, as ranging from 3 or 4 per cent. to a little over 8 per

cent. unless we are converting ourselves into a commission for Rate Regulation; which is not our province.

It follows that the appeal will have to be allowed and that the judgment of the learned Judge, (Venkatadri, J.), must be set aside. But, before leaving the appeal, and speaking entirely for myself, as one who has gone through the data placed before us, from the point of view of a balance between the growth potential of this Department, and the interests of the subscribers, who include both vast commercial enterprises and individuals I would like to make the following constructive suggestions which, however, already appear to be partly recognised in certain of the Reports.

(1) There is much to be said for a rationalisation of the Department itself, by the conversion of the Department of Tele-communications into a Statutory Corporation, with full power to plan the future, and to conduct its present affairs with fairness to subscribers. This might also mean that the return on the 'rate-base,' after Government's appropriation of dividends on subsidies, could itself be utilised in the best manner possible. (2) It has been brought to our notice that the efficiency of the personnel, judged by relative statistics of similar Departments in foreign countries, would appear to be low, in the sense of a relatively high man-power required for Units of Work; this will have to be the subject of careful study, and attempted improvement, as pointed out by the Public Accounts Committee (1968-69). (3) While not deprecating the '*measure rate system*' now in vogue, both for individual subscribers and for concerns, I think that any enhancement of tariff could well be coupled with an increase in the number of 'free calls' per quarter, say, from 150 to 200, as applicable to all subscribers. That will mean that the individual subscriber, who is certainly harder hit by any increase in tariff than a business or complex of business, particularly if he is of a middle income group, may not have to pay more than the quarterly rents. The Revenues will then be derived, largely, from those subscribers, who make calls in the period far in excess of the allowance, or those who freely utilise the Trunk Telephone System. (4) It would thus appear to be equitable that there should be a discrimination between individual private subscribers and firms, commercial concerns and Corporation that would be a reasonable discrimination, which is patently equitable. The individual subscriber could be charged at lower rates, and the Corporations of Firms at higher tariffs. This seems to have been contemplated at one stage.

In conclusion, both on behalf of myself and my learned brother, I desire to record our obligation to Sri Kumaramangalam for the appellant and Sri Mani for the respondent, both of whom have, by their painstaking labours, placed before us considerable material, in the form of precedents, Articles, and expert, treatises, as well as Reports and analyses of statistical data, illuminating this difficult subject and for their able arguments.

In the result, appeal is allowed and the judgment of Venkatadri, J., is set aside. The writ petition is dismissed. Parties will bear their own costs.

Natesan, J.—I agree with my Lord the Chief Justice that the appeal must be allowed. Having regard to the great importance of the questions raised, particularly in the context of the functions and policies of a welfare State, I shall briefly indicate the reasons for my concurrence.

The respondent in the appeal, a telephone user who has a telephone installed in his residence, questions the validity of the enhancement of the telephone tariff as per the Indian Telegraph (Amendment) Rules, 1966. The basis for the challenge before our learned brother Venkatadri, J., was that what is levied and realised for the use of telephone is a fee and, as a fee, there is no reasonable correlation between the increase in the telephone rates and the service rendered. It was urged that one of the grounds for increase in the rates was to make up for loss incurred in the postal Department, and that this was not permissible. Before our learned brother the present appellants attempted to justify the revised rates as a fee and failed. The

learned Judge observed that the fee obtained under the impugned rule was not used solely for the Telephone Department, but intended to ward off losses in other connected Departments, that the Telephone Department did not discharge its burden of correlating the levy with the service rendered by it, and that the increased rates were arbitrary, unreasonable and unjust. Before us, the appellants, (hereinafter referred to as the Telephones) sought and obtained leave to vary their answer to the *rule nisi* on a wholly different basis. The Telephones would withdraw the concession made that the levy was a fee and take the stand that the rate fixed is neither fee nor tax but price determined upon by the State for its services in a commercial enterprise run by it as a monopoly undertaking in the interests of the public. As questions of considerable importance and impact on the running of essential services in which the public may be vitally interested are involved in the case and as it is not in the interests of the public at large to declare unconstitutional rules framed under a legislative provision upon a concession as to the legal character of the levy, we permitted the Telephones to vary their case and raise additional grounds. Both sides have elaborated their respective cases on the fresh stand taken by the Telephones by supplementary affidavits, the subscriber not giving up his stand that the levy is a fee strictly so called.

The telephone system in India is maintained and operated under the provisions of the Indian Telegraph Act, 1885. The definition of telegraph is made to include telephones. Section 4 of the Act vests with the Central Government the exclusive, privilege of establishing, maintaining and working telegraphs, empowering the Central Government to grant a licence, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of India. Section 7 authorises the Central Government, from time to time, by notification in the Official Gazette to make rules consistent with the Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by persons licensed under the Act, in parituclar by section 7 (2) (*a*) to make rules to provide for "the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted." By section 7 (5) it is provided that every rule made under the section shall be laid as soon as may be after it is made before the Houses of Parliament for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses, agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be. Originally, the telephones service was in the hands of private Telephone Companies, the Oriental Telephone Company in 1881 first introducing telephone service in the City of Bombay as a commercial venture with the permission of the Government of India. Telephone Companies soon came up in Calcutta, Madras, Ahmedabad and a few other towns. In 1943 the telephones, it is said, were taken over by the Central Government. Telephone rates have always been regulated by the Government under rules framed under section 7 (2) of the Telegraph Act, both when the telephone was in private hands and since when the Government took over the telephone. Under the 1960 Tariff Rules, in Madras District, installation charges were fixed at Rs. 40 and rent for a telephone installed in a subscriber's premises at Rs. 50 per quarter with 150 free calls per quarter, charging 10 paise for every extra call over and above the free calls. The impugned tariff, introduced by the Central Government under the Indian Telegraph (Amendment) Rules, 1966 in exercise of the powers under section 7 of the Telegraph Act, came into force on the 16th day of January, 1966. This raised the installation charges in Madras District to Rs. 50, the rent to Rs. 75 per quarter and the call charge to 15 paise for every extra call over and above 150 free calls per quarter. It is the stand of the Central Government that telephones have been taken over by the State as a commercial undertaking and run on business lines, and, therefore, the Government is entitled to charge subscribers at such rates as may be prescribed in accordance with the rules and, subject to statutory regulation make any profits it can. It is submitted that, so long as there is no violation of any

statutory rule in regard to fixation of rates, the reasonableness of the rates is not justiciable under Article 226 of the Constitution of India.

For the subscriber, it is contended that, as the telepnone service is a public utility undertaking, the Government cannot contend that the telephones could be run purely on business lines and rates charged the reasonableness of which cannot be called in question except for violation of statutory rules in the fixation of rates. The Government which ratains the exclusive privilege of running a public utility service, it is said, cannot claim any arbitrary power in the fixation of rates, not amenable to judicial scrutiny. In particular, it is emphasised that rules fixing rates are made by the Central Government under delegated power, that fixation of price is a legislative act, and, therefore, the delegated power has to be exercised in the public interest in a just and reasonable manner consistent with the accepted canons of price fixing in monopoly undertakings of public utility services. The attack on the validity of the new rates may be summarised under three heads : Firstly, the revision of the rates is *ultra vires* of the rule making power not having been exercised in a just and reasonable manner with due regard to the various factors that should guide fixation of rates with reference to a monopoly public utility service. In developing the argument under this head, it is *inter alia* urged that there was excessive delegation of legislative power by section 7, there being no guide lines whatsoever for fixing rates. Secondly, it is a case of colourable exercise of power and therefore *ultra vires*. Thirdly, an exorbitant increase in the rates is an imposition of unreasonable restrictions on the subscriber's fundamental rights under Article 19 (1) (*f*) and Article 19 (1) (*g*) ; that the restrictions are not in the interests of the general public, viewed from any principle of social economics or public finance, and so are unconstitutional.

The State's power to assume monopoly in any trade, business, industry or service either by itself or by a corporation owned or controlled by the State, is protected under Article 19 (6) of the Constitution. The State may take up any industry or business or service for administrative reasons or in the interests of national economy or progress, or with the object of mitigating the evils flowing from competition, or with a view to regulating prices or improving the service. There is nothing in the Constitution precluding the State from entering into business or a commercial service or industry for the purpose of making profits to add to the State's exchequer. No embargo has been placed on the State to carry on business in competition with citizens. Article 298 provides that the executive power of the State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The power to make laws with reference to posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication is found in Entry 31 of the Union List. Since the amendment of Article 19 (1) (6), State's monopoly in respect of any trade, business, industry or service, complete or partial, must be presumed to be reasonable and in the interests of the general public, so far as Article 19 (1) (*g*) is concerned. While a law creating State's monopoly is protected, the protection is limited to the laws relating to monopoly in its absolutely essential features. Only the provisions of laws which are integrally and essentially connected with the creation of the monopoly are protected and the rest of the provisions which may be incidental and not basically necessary for the creation of monopoly get no protection. The provisions of the law excepting those relating to monopoly, complete and partial, have to satisfy the test of the first part of Article 19 (1) (6), when Article 19 (1) (*g*) is invoked by a citizen. The Court could enquire and determine, if required, what are the provisions of law that are protected under the later part of Article 19 (1) (6) and adjudge the validity of the rest under Article 19 (1) (*g*). If a law creating a State monopoly contains incidental and ancillary provisions not essential and not forming an integral part of the monopoly created, and they directly impinge any of the other fundamental rights under Article 19 (1), their validity could be tested under the corresponding clauses of the Article. Fixation of price need not always and necssarily be an essential part of law relating to State monopoly. See *Akadasi* v. *State of Orissa*[1]

1. (1964) 2 S.C.J. 37: A.I.R. 1963 S.C. 1047.

The arguments before us proceeded on the common basis that telephone today is not a luxury but a necessity, to the State, to the individual, to commerce and industry, and that telephone service is a public utility service. It will be convenient therefore to start with an examination of the characteristic of a public utility service or enterprise. Mr. Mohan Kumaramangalam, learned Counsel for the Telephones, referred us to an article under the head public utilities, at page 744 B, in Encyclopaedia Britannica, where it is stated that public utility industries are closely associated with our developing civilisation, supplying wants so fundamental for communal living that Government has at all times subjected them to some measure of control, and that these industries should be distinguished from State services or public works, which are administered as public functions and hence supported by taxation, and from that variety of industrial, commercial and agricultural undertakings which are usually comprehended under the term "private business". The article shows that, in almost every country, a varying number of public utilities are owned and operated by the State, but that these publicly managed enterprises, instead of looking to the State for financial support, sell their services to the general public. Both publicly and privately owned utilities, it is said, sell their services at prices, which are not fixed in the open makret but are governmentally fixed, and this feature is the most important aspect of the process known as public utility regulation.

Counsel draws our attention to passages in Corpus Juris Secundum, Volume 73, under the title Public Utilities and passages from leading text books on the subject and cases decided by the Supreme Court in the United States, where the rights and obligations of a public utility service have received considerable attention. As pointed out in Corpus Juris Secundum, Volume 73, at page 998 broadly speaking, the primary duty of a public utility is to give reasonable and adequate service at reasonable rates and without delay. A public utility is obliged to furnish its service or commodity to the general public, or that part of public which it has undertaken to serve, without arbitrary discrimination. The term "rate" as used in connection with public utilities signifies a charge to the public for a service open to all measured by a specified unit or standard. The rates are usually fixed with reference to what is called a rate base or valuation of property devoted to the public use on which the utility is entitled to receive a fair return. In the States the public utility services, including telephones, are owned and run by private corporations and the State's power to regulate the public utility services is founded on the police power of the States. Under this power, the State could rgulate the rates and charges of public utility companies and fix the maximum rates to be charged for their services and the use of their facilities, subject to the limitation that such regulations and the rates thereby presecribed are reasonable and non-confiscatory. The power to regulate telephones and telegraph rates is exercised by the Legislature itself or, as in often the case, the power is delegated to a board or commission. In Corpus Juri Secundum, Volume, 86, at page 106, the position is thus stated :

"It is a universal rule that rates established by a telegraph, telephone, or similar company under the power of regulation, whether directly by the State or through the agency of a municipality or commission to which such power has been delegated, must be reasonable, compensatory, and non-confiscatory. The main elements of reasonable rates are to cost of rendering the service on an economical and efficient basis, a fairr eturn to the company on its property used in the performance of the service, and fairness to consumers."

The test of reasonableness is said to be whether the revenue produced by such rate yields a profit which, after due allowance is made for depreciation, upkeep, and legitimate cost of operation, is a reasonable return on the value of the company's property. At page 107 of the Volume, it is observed :

"It is ordinarily held that telephone and telegraph rates must be just and reasonable both to the company and to subscribers; the rate must not be so low as to be confiscatory, or so high as to be unjust or oppressive or as to exceed the value of the service to consumers while it has been held that the fundamental inquiry

is as to the rate necessary to produce a reasonable return to the telephone or telegraph company, the broader view is that the interests of both the company and the public must be considered and that a proper final result is reached by balancing of the investor and consumer interests."

Judicial examination of the validity of legislative regulation of rates and service in respect of public utility service started in the United States with the well-known case of *Munn* v. *Illinois*[1], by the Supreme Court of the United States. The pegging down of rates under the police power by Legislatures and commissions statutorily constituted to regulate public utilities to just and reasonable price for services rendered were challenged as violative of the Constitutional guarantee of due process of law under the 5th and 14th Amendments. Tracing the power to regulate price to the common law, the Supreme Court held that the Legislature of Illinois could fix, by law, the maximum charges for storage of grains in wharehouses of Chicago and other places in the United States. The Supreme Court ruled that fixation of maximum price was due process of law because when " one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. "Reliance was placed on the principle laid down in the Seventeenth Century, about 1670, by Lord Chief Justice Hale of the King's Bench of England in his essay De Portibus Maris in these words :

" If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, according to the statute of I.EL.cap. 11. or because there is no other wharf in that port, as it may fall out where a port is newly erected ; in that case there cannot be taken arbitrary and excessive duties for crange, wharfage, pesage, & c. neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the kings' licence or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only."

In later cases the view that regulation was permissible only when the business was affected with public interest was given up, the distinction between private trades and business affected with public interest was abrogated and all trades without difference were subjected to State control in the exercise of police power see *Nebbih* v. *New York*[2]. It is not necessary to refer at length to the several cases that have been placed before us on the development of law and the pains at which the regulatory commissions and Courts in the United States have been, at evolving some principle for determining what would be a fair and non-confiscatory return. Reference may, however, be made to *Wolf Packing Co.* v. *Court of Industrial Relations*[3], *Lyson* v. *Banton*[4], *Missori Ex. Rel. S. W. Bell Co.* v. *Public Service Commission*[5], and *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*[6].

In *Missouri Ex. Re. S.W. Bell Co.* v. *Public Service Commission*[5], it is observed :

"The investor agrees, by embarking capital in a utility, that its charges to the public shall be reasonable. His company is the substitute for the State in the performance of the public services, thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business. Cost includes not only operating expenses, but also capital charges. Capital charges cover the allowance, by way of interest for the use of the capital, whatever the nature of the security issued therefor ; the allowance for risk incurred ; and enough more to attract capital. The reasonable rate to be prescribed by a commission may allow as efficiently managed utility much more. But a rate is constitutionally compensatory if it allows to the utility the opportunity to earn the cost of the service thus defined."

1. (1877) 94 U. S. 113.
2. (1934) 291 U. S. 502.
3. (1923) 262 U. S. 522.
4. (1927) 273 U. S. 418.
5. (1923) 262 U. S. 276 at 291.
6. (1923) 262 U. S. 679.

The decision records that a fair return upon properties devoted to public service cannot be determined without giving consideration to the cost of labour and supplies at the time the investigation is made. In *Bluefield Water Works and Improvement Company* v. *Public Service Commission*[1], it is said that a public utility is entitled to earn a return upon the value of the property which it employs for the convenience public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but that it has no constitutional right to profits such as are realised or anticipated in highly profitable enterprises or speculative ventures. In *Federal Power Commission* v. *Natural Gas Pipeline Co.*[2], *Federal Power Commission* v. *Hope Natural Gas Co.*[3], and in *Wiscosin* v. *Federal Power Commission*[4], the Supreme Court pointed out that the Federal Commission was not bound to the use of any single formula or combination of formulae in determining rates, and that its rate-making function involved the making of 'pragmatic adjustments.' It was held that when the Commission's order was challenged in the Courts, the question was whether that order 'viewed in its entirety, met the requirements of the Act, and that under the statutory standard of 'just and reasonable' it was the result reached and not the method employed which was controlling. Our attention was drawn to several elements that have been examined in arriving at the proper rates. It is seen from the cases cited above that determination of the rate base-value of the property of the concern used and useful in the public service minus accrued depreciation for which a just and reasonable value has to be provided is an extremely difficult problem dependent on several factors. A reference to the text books and the cases gives us five economic terms; tax, fee, special assessment, rate and price, and, as pointed out by Glaesor in Public Utilities in American Capitalism, at page 7, these 'express as if in a declining magnitude, the social importance of an economic function, while the entire series recapitulate the social process of customary classification in accordance with some scale of social evaluation.' One thing emerges, that the word 'rate' is not equivalent to 'fee' strictly so called in taxation parlance, nor is it the commercial 'price.'

Now, section 7 (2) of the Telegraph Act enables the Central Government to make rules providing for the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted. The crucial question is what does this expression 'rates' in the Telegraph Act, mean ; What are the powers of the Government in this regard under the Act? The Central Government, under section 4, has assumed monopoly of the service. Fixation of rates is clearly a legislative function. The American cases which provide for a reasonable return to a public utility were concerned with not depriving the owner of property of the due return on his outlay by confiscatory rates in the process of regulation. Our attention has not been drawn to a single case where the rate with reference to a State or nationalised undertaking of public utility had been the subject of judicial scrutiny. The regulatory commissions in the United States guarded the interests of consumers and the public at large. In fact, in some of the cases cited, commissions have taken up the matter to the Supreme Court, when the Court of first instance interfered with the fixation of rates by the Commissions see *Federal Power Commission* v. *Natural Gas Pipeline Co.*[2]; A State may take up public utility enterprise to advance the interest of the public, if need be, ignoring financial tests and safe returns. It is perfectly open to the State to subsidise certain enterprises and projects. In fixing the price of its service, the Government may allow extra commercial considerations to enter into the determination. It may take up an enterprise not with a view to recover costs, but to promote the general welfare. That being so, a price fixed by the State need not necessarily be on a part with the one that would or may properly be charged by a private concern with reference to the same service. The price fixed by the States may be lower or higher. While ordinarily like a private enterprise, a public commercial enterprise should also be

1. 262 U S. 678.
2. (1942) 315 U.S. 575.
3. (1944) 320 U S. 591.
4. (1963) 373 U S. 294.

self-supporting, at any rate in respect of a public utility service it may not be unbusinesslike, if the Government, having regard to various objectives, in the large interests of the country operates a public utility at a loss. The interests of Government are inevitably broader than those of private enterprise. There can be different views as to how a particular public service should be provided by the Government, whether at an economic price, that is, at a price just covering the cost of production and recoverable allowances for replacement, expansion and maintenance, or at a price that should include something over and above the economic price and to what end. Whether a public utility like the telephone service should be run by the Government on ' no profits no loss ' basis, or as a subsidised enterprise or at marginal profits, or as an earner of substantial profits, is a matter of policy. Whether the expansion programme of a public utility service should rely solely on its own reasources or should depend at least partially on the general revenues, is again a matter of policy. The consumer may ask why the State should be motived by the crude economic motives which are supposed to inspire the capitalist. But consistent with the nature of the public utility service and the section of the public it would, in the main, be serving and its place in the economy of the State, a Government may decide that the service must bring in substantial profits, to be utilised for other Governmental activities. In socialistic States like U.S.S.R. a public enterprise may be called upon to contribute from its profits both for its own expansion and for the State's budget. In the Report of Posts and Telegraphs Tariff Enquiry Committee July 1968, which has been placed on record in this case, it is noticed that in 1924 the Member-in-charge of the Department of Industries and Labour stated in the Legislative Assembly that the Posts and Telegraphs Department should pay its way and that the Government did not look upon it as a revenue earning Department. In the same report, at page 37, the Committee observes:

> " The Committee consider that the tariffs for various telephone services should produce revenues to cover costs of the telephone branch, namely, working expenses, cost of research and development, depreciation and dividend payable. These revenues should provide for an adequate surplus to cover marginal losses, if any, of the other branches and also generate sizable resources for the development of tele-communication services."

There appears to be a view that, while the Postal Department is primarily and essentially a public utility, the tele-communication is not so. The view cannot be said to be devoid of basis.

The preceding brief discussion shows that there is no absoute rule that every public utility service ought to be made to earn a reasonable return or only a reasonable return after providing for all reasonable allowances. The question raised, during the course of arguments, whether in the Indian Telegraph Act there is any clear guidance for the Central Government in the matter of fixing rates may first be disposed of. The Act was passed in 1885 and till about 1943, the telephone service was in the hands of private companies. There has been no substantial amendment to the Act after the Posts and Telegraphs service became a national undertaking. It could with some force be contended that the principle of rate-making applicable to public utilities in private sector should not be engrafted without modification, when the utility has been taken over by the Government both from the standpoint of the utility and the consumer. Where a policy decision is called for, the matter cannot, without any guide-lines, be committed to the executive. It is a well settled principle that the Legislature must retain in its own hand the essential legislative function and what may be delegated is subordinate legislation necessary for implementing the purposes and objects of the Act. The legislative policy must be enunciated, and, if that is done with sufficient clearness or if a standard is laid down in that regard, the delegation would be valid.

When a rule is attacked on the ground that there is excessive delegation of legislative power, what has to be examined is whether the rule-making authority

has been supplied with proper guidance, or whether there has been abdication by the Legislature of its function, leaving it to the executive to frame rules on its own unguided initiative. In In re *The Delhi Laws Act case*[1] Mukherjea, J. (as he then was) observed:

"..........it is within powers of Parliament or any competent legislative body when legislating within its legislative field, to confer subordinate administrative and legislative powers upon some other authority. The question is: what are the limits within which such conferment or bestowing of powers could be properly made?.......................................
if the Legislature hands over its essential legislative powers to an outside authority, that would, in my opinion, amount to a virtual abdication of its powers and such an act would be in excess of the limits of permissible delegation.

The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the Legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the frame-work of that policy."

Illustrative of the absence of sufficient guidance to the rule making authority, reference may be made to the decision of the Supreme Court in *M/s. Devi Das* v. *State of Punjab*[2], where the validity of section 5 of the Punjab General Sales Tax Act, 1948 as it originally stood which conferred on the Provincial Government power to levy every year on the taxable turnover of a dealer a tax at such rates as the said Government might direct, came up for consideration. The section was declared void, as under the section the Legislature practically effaced itself in the matter of fixation of rates and did not give any guidance either under the section or under any other provisions of the Act. Subba Rao, C.J. delivering the judgment of the Court, points out that, for a statute delegating power to a statutory authority to levy taxes, 'the minimum we expect of the Legislature is to lay down in the Act conferring such a power of fixation of rates, clear legislative policy or guide lines in that regard. Enunciating the principle of excessive delegation, it was said :

" The Constitution confers a power and imposes a duty on the Legislature to make laws. The essential legislative function is the determination of the legislative policy and its formulation as a rule of conduct. Obviously it cannot abdicate its functions in favour of another. But in view of the multifarious activities of a welfare State, it cannot presumably work out all the details to suit the varying aspects of a complex situation. It must necessarily delegate the working out of details to the executive or any other agency. But there is a danger inherent in such a process of delegation. An overburdened Legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the exutive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self-effacement of legislative power in favour of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the Legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

1. (1951) S.C.J. 527 : (1951) S.C.R. 747 at 981 and 982,

2. (1969) 1 S.C.J. 19 : (1969) 1 I.T.J. 224: A.I.R. 1967 S.C. 1895 at 1901.

Reference may also be made to *J. W. Hampton* v. *United States*[1], where the power given by the Congress to the President to make changes in the rates provided in the Tariff Act of 1922 was challenged as a forbidden delegation of legislative power to executive authority. In negativing the challenge, the Supreme Court pointed out that the Congress has laid down by legislative act an intelligible principle to fix the rate of customs duties on imported merchandise. The President could vary the rates with the aid of his advisers after proper investigation on the ground of differences of cost of production in the United States and abroad and he could also make such increases and decreases in rates of duty as were found necessary to equalise the cost of production. The limit of such change was fixed up to 50 per cent of the rates specified in the law. In *Delhi Municipality* v. *B. C. S. & W. Mills*[2], Wanchoo, C.J., after referring to the above American case, on the form of the guidance may take to a local body in fixing rates, observed:

"So long as the Legislature has made provision to achieve that reasonable rates of taxation are fixed by local bodies, whatever may be the method employed for this purpose—provided it is effective—it may be said that there is guidance for the purpose of fixation of rates of taxation. The reasonableness of rates may be ensured by fixing a maximum beyond which the local bodies may not go. It may be ensured by providing safeguards laying down the procedure for consulting the wishes of the local inhabitants. It may consist in the supervision by Government of the rate of taxation by local bodies. So long as the law has provided a method by which the local body can be controlled and there is provision to see that reasonable rates are fixed it can be said that there is guidance in the matter of fixing rates for local taxation."

The contention is open in this case that the delegated authority, in this case the executive, is not merely to work out details but also to determine the policy to be pursued in fixation of rates, and that that is an essential legislative function. It could be urged that, if at least there is indication of maximum and mimum rates, that would provide the necessary guidance, although the policy is not stated. The Act was made in 1885 when the executive was all powerful, and, to adopt the words of Subba Rao, C.J., the Legislature may unduly overstep the limit of delegation. Webstor's New 20th Century Dictionary gives the following among several meanings to the expression "rate":

"Price or amount stated or fixed on anything with relation to a standard; a fixed ratio; a settled proportion; as, the rate of interest is 6 per cent a price or value; specifically, the cost per unit of some commodity, service, etc.; as an electricity rate, insurance rate."

In itself the expression contains no limitation. The amendment of the Act after independence has provided only for laying of the rules before the Houses of Parliament when in session or for a period of thirty days.

It is contended for the telephones that there are substantial safeguards in the matter, for Parliament before which the rules have to be laid may annul or vary the rates, if the same is against the policy of the Legislature. Under section 7 (5) of the Act, every rule has to be laid down before each house of Parliament while it is in session for a total period of thirty days, so that both the Houses may agree in making any modification in the rule or may agree that the rule should not be made. If there is any modification, it has effect only in the modified form. If it is annulled the rule ceases to have any effect: Only modification or annulment shall not prejudice the validity of anything previously done under that rule. In *D. S. Garewal* v. *State of Punjab*[3], it was observed that, where Parliament took care to see that the rules were laid on the table of Parliament for fourteen days before they were to come into force and they were subject to modification, whether by way of repeal or amendment on a motion made by Parliament during the session in which

1. 276 U.S. 394.
2. (1969) 1 S.C.J. 621 : A.I.R. 1968 S.C. 1232 at 1244.
3. (1959) S.C.J. 399 : (1959) 1 S.C.R. 792: A.I.R. 1959 S.C. at 518.

they were so laid, it was perfectly clear that Parliament had in no way abdicated its authority, but was keeping strict vigilance and control over its delegate. In In re *The Delhi Laws Act Case*[1], Fazl Ali, J. expressed the view that laying rules before Parliament either in draft form or with the condition that they are not to operate till approved by Parliament or with no further direction is a valuable safeguard. It is true that rules under the Act in consideration become effective on publication. Subject to only to modification or annulment by Parliament, and may not, therefore, having regard to the natural of the power to be exercised, be a sufficient safeguard. Counsel are not in a position to say whether there is any Committee of Parliament to scrutinise rules so laid which do not require the approval of Parliament to become effective. But admittedly the revenue and expenditure of the department are the subject of budget proposals. Necessarily the rates are open to examination and discussion by Parliament. Even so, the question of validity of the delegation is not free from difficulty. But I find I need not tarry on this aspect further, since it is unnecessary for us to express any definitive view on the question. The vires of section 7 (2) (*a*) as a piece of imperimissible delegation of legislative power was not specifically raised even in the supplemental affidavit and put in issue, though incidentally there was discussion on the question during arguments. The attack on the rule was concentrated on the actual exercise of the delegated power. When Mr. Mohan Kumaramangalam, learned Counsel for the Telephones, was taking this Court through the rate fixing principles for public utilities in the United States, this Court raised the question whether it would not make a difference if a public utility is run by the State itself. We had the astute answer from Mr. Mohan Kumaramangalam, that it would make no difference, and that the principle that a public utility concern can expect only a reasonable return, will apply equally whether the utility is run by the State or by a private corporation. The effect of this concession for that is what the subscriber has been contending for in his supplementary affidavits is to show a well recognised principle for rate fixing and meet the argument that the executive has been invested with unfettered and arbitrary power in fixing rates. In the result, on this part of the case, we have to examine only the due exercise of delegated power in fixing rates. A mass of statistics and budgetary figures have been placed before us to show that the return to the State in the present case is very much less than what the American cases have held to be a reasonable and fair return, warranting an increase in the rates. Mr. Mohan Kumaramangalam, however, questions the very maintainability of the petition by a subscriber challenging the fairness of the rates.

The contention for the subscriber is that the expression " rates " in section 7 (2) (*a*) having a well establihsed significance and well understood with reference to public utility services, such rates fixed have to be viewed in two aspects, namely (1) as they relate to the legitimate interest of the public and (2) as they relate to the public utility concern which provides the service. The rates, it is said, must be fair and not extortionate. It must not be a tribute or exaction which the subscriber has no option but to pay, the service being an essential public service which he cannot give up. In the present case, the executive have been authorised to fix the rates. If the rates do not conform to the requirements as to reasonableness and fairness, it is said, they would cease to be rates and so *ultra vires* of the rule-making authority. It is urged that, if in the levy of rates, considerations other than a reasonable return to the service on its capital outlay should enter and the subscriber should be fleeced for other Governmental purposes, it would become a tax which the rule-making authority is not entitled to levy. Rating for heavy profits, it is said, is veiled taxation, and so colourable exercise of power, and that it is so in this case.

The claim for the Telephones that in no circumstances a subscriber can challenge the rates, is, in my view, untenable. It is a well established principle that rules made under statutory authority can be challenged as not in conformity with the power conferred, that is, *ultr vires* of the statutory requirements. Certainly it will be open to the subscriber here to challenge the new tariff as outside the scope of the enabling power and bring the rule under judicial scrutiny. The liability to judicial.

1. (1951) S.C.J. 527 : (1951) S.C.R. 747 at 850.

scrutiny stems here from the concession made on behalf of the Department that the concept and content of the expression "rates" in section 7 (2) (*a*) finds elucidation in the rate cases in the United States which themselves are founded on the dicta of Lord Hale in his essay De portibus Maris. Lord Hale, with reference to business affected with public interest, said that arbitrary and excessive duties should not be charged, nor could the rates enhanced be immoderate, and that the rates must be reasonable and moderate. We proceed on the basis that the policy which should guide the Central Government in fixing the rates in question is fairly clear and what is left by the Legislature for the executive is to work out the details according to the policy. Learned Counsel for the Telephones submitted that, since statutory rules have been framed, they are as effectual as if enacted by the Legislature and their reasonableness is not a matter for judicial examination. Reference was made to the observations in *Subba Rao* v. *Income-tax Commissioner*[1].

> "It is well established law that rules authorised to be made by an enactment, are as effectual as if they were a part of the Act itself, the question of their reasonableness, fairness or propriety not being a matter for the Courts to investigate".

Our attention was also drawn to the dicta of the Supreme Court in *T.B. Ibrahim* v. *Regional Transport Authority*[2], that by-laws and rules made under a rule-making power conferred by a statute do not stand on the same footing, as such rules are part and parcel of the statute itself. But the citations proceed on the postulate of the validity of the rule. The observations assume the validity of the rule. Once the rule has been validly made and is not *ultra vires* of the rule-making power, it becomes as effective as the parent Act. Here the argument for the subscriber is that Parliament has empowered the Central Government to make rules providing for rates at which messages shall be transmitted and that the charges now levied are not in reality "rates" as the expression is meant to be understood. It is said that the "rates" now fixed under section 7 (1) (*b*) which have necessarily to be reasonable and not immoderate are not so, and are therefore invalid.

A question has been mooted, in the coarse of arguments whether a common law concept of rating public utility service propounded by Lord Hale can be availed of for interpreting an Indian statute. Here we are interpreting a statute enacted in 1885 by the English Rulers and it is a sound rule to consider the statute in harmony with the common law that could have prompted it rather than against it, except in so far as the statute is plainly intended to alter the course of the common law. Why should we assume that the word "rates" was used in vacuum? The American precedents, starting with *Munn's case*[3], relied on the common law of England as a source of the right which the Amercian Constitution protected. Our Courts have freely drawn upon the common law of England, in the absence of any statutory law or personal law governing the matter. The Charter of Charles II and the latter Charters enjoined upon the East India Company and its servants due obedience of the common law and statute law of England. This first introduced the common law of England in this country. Towards the close of the 18th Century, on the establishment of the Supreme Courts in Madras, Calcutta and Bombay, the King's Judges administered the common law of England. The Civil Courts Act of 1873 provided that in cases where no specific rule existed the Court shall act according to justice, equity and good conscience. The English Judges who sat in the Company's Courts were advised by pundits on points of Muhammadan law and Hindu law and outside these jurisdictions they naturally looked for guidance to the principles of the common law of England which was familiar to them and was considered as embodiment of common sense. By practice of Courts a Custom sprang up of looking to the English common law for guidance and precedents where there was no customary Hindu or Muhammadan law or statutory law governing the case. The common law supplied to the Judges here with rules and precedents considered as in accordance with justice, equity and good conscience. Thus the common law of England, to the extent it was not opposed to our statutory laws and recognised customary and

1. (1951) 2 M.L.J. 424: 20 I.T.R. 337: A.I.R. 1952 Mad. 127 at 134.
2. (1953) S.C.J. 31: (1953) S.C.R. 290: (1953) 1 M.L.J. 205: A.I.R. 1953 S.C. 79 at 82.
3. (1877) 94 U.S. 113.

personal laws, came to be considered as the law of the land—see *Gopal Naidu* v. *King Emperor*[1]. To what extent the English common law applies to this country has been the subject-matter of judicial decisions. As pointed out by Satyanarayana Rao, J., in *Seethalakshmi* v. *Veerappa*[2], the net result of these decisions is that the English common law does not apply when there is statutory law covering the point, and even when there is no rule of statute, the common law of England is applied *suo moto* having regard to the conditions of the society and customs and manners of India. We are here not applying the common law of England. We are only on the question whether the English word " rates " has a recognised significance in the context of its user. Viscount Simonds in *Attorney-General* v. *Prince Ernest Augustus of Hanover*[3], remarks :—

> " I conceive it to be my right and duty to examine every word of a statute in its context, and I use the word ' context ' in its widest sense..........as including not only the enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

The Telegraph Act is an Act of 1888 and is in respect of a public utility, and charges in respect of public utilities carried certain limitations even at the time the Act was passed. Lord Ellenborough, C.J., said in *Allnutt* v. *Inglis*[4]:

> " There is no doubt that the general principle is favoured both in law and justice that every man may fix what price he pleases upon his own property or the use of it ; but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms."

The rates fixed under a statute as charge for a public utility service are, therefore, justiciable in the sense that their validity can be challenged as not in accordance with the recognised concept of rates. The statutory mandate to the Executive is to fix rates with reference to a public utility service. These rates have to be reasonable and fair and guard the interests of the public, whom the utility a monopoly concern, is intended to serve. If the charges levied are not in accordance with the provisions of the mandate but unreasonable and extortionate they would be *ultra vires* the power vested in the executive and so unenforceable.

Before I examine the reasonableness of the rates to test its validity as a piece of subordinate legislation, it will be convenient to take up the challenge of the subscriber of the validity of the rates as violative of his fundamental rights under Article 19 (1) (*f*) and (*g*) of the Constitution. During the course of arguments, the subscriber has not pressed his claim to protection under Article 19 (1) (*g*), as the telephone secured by him is obviously used only for domestic purposes, and it is not his contention that he is practising any profession or carrying on any occupation, trade or business. It is said that the charges now levied restrict his property rights under Article 19 (1) (*f*) in an unreasonable manner. Having regard to the fact that it is a public utility service, the exhorbitant levy which restricts his reasonable enjoyment of telephone facilities, it is contended, cannot be considered to be in the public interest. The unreasonable levy, it is said, is an effective denial of the service he is entitled to from the public utility undertaking . His failure to meet the new demand will result in his being deprived of the telephone. Here two questions arise for consideration : (1) Whether at all the telephone amenity enjoyed by the subscriber is property, and (2) whether any of his fundamental rights in relation thereto is affected.

There is no definition of property in the Constitution, and it has been observed by the Supreme Court that the phraseology used in Article 19 (1) (*f*) is wide and

1. (1922) I.L.R. 46 Mad. 605 at 622 : 44 M.L.J. 655
2. (1952) 1 M.L.J. 709 : A.I.R. 1952 Mad. 736.
3. (1957) A.C 436 at 461: (1957) 2 W.L.R. 1: (1957) 1 All E.R. 49.
4. (1810) K B. East 527 : R.R. Vol XI 482.

prima facie it takes in its wake both abstract and concrete rights of property. Section 3 (26) of the General Clauses Act (Central Act X of 1897) defines immovable property as including land, and things attached to the earth, or permanently fastened to anything attached to the earth. Section 3 (36) defines movable property as property of every description, except immovable property.. What is property, and in what a person may have proprietary right, will necessarily change from age to age. The concept of private property, like that of individual personalty, has had a steady development from the beginnings of law. Our ideas of property and proprietary rights are changing and new forms of property are coming into existence. Article 19 (1) (*f*) protects rights to acquire, hold and dispose of property and the constitutes an organic law. The language used is perfectly general. It is not restricted to acquisition, holding and disposal of property by particular methods or to particular type of interests. The General Clauses Act, while defining movable and immovable properties, has given no exhaustive definition and placed no limitation as to what all the expression " property " could take in. It has only categorised property into movable and immovable. In this age of advancing science and changing political and economic concepts the categorisation is plainly inadequate. Property, it has been said, is *nomen generalissimum* and extends to several species of valuable rights and interest, including real and personal property, incorporeal hereditaments, such as rents and services, rights of way, rights of profit or use in land of another, and chose in action—see *Minister of State for the Army* v. *Dalziel*[1], in which the above observation is made in interpreting the expression "property " in section 51 (*xxxi*) of the Australian Constitution. In Salmond's Jurisprudence 12th Edition at page 421, it is said that the subject-matter of right of property is either a material or immaterial thing, and that in the great majority of cases a right of property is a right to the uses of a material object. In the Treatise Jurisprudence and Legal Essays by Ferderick Polock, at page 72, we find the following :

> "Again we may have rights over tangible things which belong to others ; rights of way over land, rights of using or detaining goods by way of loan, hire, or pledge, and so forth. These rights can be and are regarded in law as having distinct and measurable values, and whatever has such value is a thing, though not a bodily and sensible thing. These benefits can be part of man's inheritance of goods, of his ' estate and effects', to use the large term known to our law ; they are capable of transmission and, for the most part, of voluntary alienation. We must recognise as things, in fact, all objects of exchange and commerce which are recognised by the usage of mankind ".

The law of property, according to the learned Jurist, is in the first place the systematic expression of the degrees and forms of control, use and enjoyment, that are recognised and protected by law. In Paton's Jurisprudence, 3rd Edition, at page 481, we find that property necessarily includes the right to contract: this may come in under Article 19 (1) (*f*), the right to acquire. It is said that the term ' property ' is extended to cover whatever has a present or potential material value. The once overwhelming importance of landed property is now eclipsed by the growth of new forms of wealth and the nature of property is being extended economically. While to the logic of the law a share certificate is theoretically mere evidence of a right to receive dividends and to share in the funds of the company if it be dissolved while still solvent, economically the share certificate is itself property. In Corpus Juris Secundum, Volume 73, at page 139, in dealing with property, we find the following stated :

> " In modern legal systems, property includes practically all valuable rights, the term being indicative and descriptive of every possible interest which a person can have, in any and every thing that is the subject of ownership by man, including every valuable interest which that can be enjoyed as property, and recognised as such, equitable, interests as well as legal interests, and extending

1. 68 C.L.R. 251 at 290.

to every species of valuable right or interest in either real or personal property, or in easements, franchises, and incorporeal hereditaments."

It is said that the word "property embraces everything which is or may be the subject of ownership, whether a legal ownership, or whether beneficial to which the right of property may legally attach, no matter how infinitesimal in quantity. A more comprehensive meaning is presumed to have been intended in the use of the word "property" in a Constitution than in a statute, for the former being the organic instrument, it is presumed to have been couched in broader language than in the case in a statute, which usually concerns itself with precise matters. In *The Commissioner of Hindu Religious Endowment* v. *L. T. Swamiar*[1], Mukherjee, J., (as he then was) said that there is no reason why the word "property" as used in Article 19 (1) (*f*) of the Constitution should not be given a liberal and wide connotation and so interpreted should not be extended to those well recognised types of interest which have the insignia or characteristc of proprietary rights. Law recognises and protects limited rights with respect to property owned by others to the extent of the limitations. The right to enjoy a thing and use it to one's advantage is a valuable right. Roscoe Pound, in his Jurisprudence, Part 4, at page 129, points out the recognition in legal system of *jura in re aliena*, limited real rights, rights of definite persons, of a limited and defined nature with respect to property which usually is owned by others but in which, according to recent codes and to some extent in our law, they may have for the time being other proprietary rights also. Of the attributes of property recognised are the right of acquisition the right of dominion, the right of possession, the right of use and enjoyment, the right of exclusion and the right of dispossession.

Mr. T.R. Mani, submits that the telephone, which his client has secured with its attendant facilities provided by the undertaking, has all the attributes to be considered as property under Article 19 (1) (*f*). While the telephone apparatus and equipment may belong to the undertaking, subject to availability, a subscriber is entitled, on payment of the necessary charges, to get a telephone installed at his residence for his use. Rule 429 contemplates limited rights of transfer of telephone by a subscriber. He shall not, without the permission of the Telegraph Authority, assign, sublet or otherwise transfer the telephone. Rule 430 provides that, in the event of the death of a subscriber or a change in the constitution of a subscriber firm or institution, the person claiming to be successor to such subscriber shall immediately give notice thereof to the Telegraph Authority and shall apply for permission to retain the connection or service. The option of the subscriber to surrender the apparatus with all fixtures and accessories is recognised under the rules. A subscriber is enjoined to take good care of the telephone apparatus, all fixtures and accessories connected therewith and if the apparatus on the subscriber's premises is damaged, he has to bear the cost of repairing, renewing or replacing it. Telephone rentals are payable monthly, quarterly or annually. Learned Counsel submits that, having regard to these aspects, the telephone installed at the premises of the subscriber with its attendant service has essential attributes of property under modern conditions. The telephone, it is said, adds to man's wealth and establishment. The property which the subscriber may have in the telephone may be limited or controlled; still there are certain elements of a proprietary character recognised by the Telegraph Act itself to the subscriber.

Mr. Mohan Kumaramangalam for the Telephones referred to the decision of the Supreme Court in *Dwarkadas* v. *Sholapur Spinning and Weaving Co.*[2], where it was doubted whether certain rights of a shareholder in a company, *viz.*, the right of voting, the right to elect directors, and the right to apply for the winding up of the company, could be called property within the meaning of Article 31 (2). Its was pointed out that by itself apart from the shares, none of them can be acquired or disposed of. There the rights in question were only incidents of the ownership of

1. (1954) S.C.J. 35: (1954) S.C.R. 1005: (1954) 1 M.L.J. 596: A.I.R. 1954 S.C. 282.

2. (1954) S.C.J. 175: (1954) S.C.R. 674: (1954) 1 M.L.J. 335: A.I.R. 1954 S.C. 119.

shares. The rights and interests in the telephone may be limited but are not of the character of the rights in shares which were doubted to be property. In the other case *Amar Singh* v. *Custodian, Evacuee Property, Punjab*[1], cited by learned Counsel, the Supreme Court held that the interest of an allottee under the quasi permanent allotment scheme did not in any sense constitute even qualified ownership of the land allotted. The interest given was provisional and there had to be a series of inter Dominion conferences to settle on Governmental level the problems arising out of evacuee property in either country. The stabilisation had to await the results of such conference. The rights had to be regulated from time to time with reference to various considerations and policies and the external problem of arriving at understandings between the two Governments. An element of unstability was there. In those circumstances, it was said that an interest in land owned by another could not be fitted into any concept of "property" itself to attract protection of fundamental rights. Counsel laid emphasis on the following observations of the Supreme Court:

> "The interest of the quasi permanent allottee arises by statutory grant to a specified class of persons and is not capable of acquisition by the ordinary citizen in any of the normal modes."

Mr. T.R. Mani, distinguishing this decision, points out that, subject to availability, every citizen who is prepared to pay the prescribed amount can acquire a telephone. With reference to a public utility service, the law requires it to severe (1) all, (2) with reasonable, and adequate facilities, (3) without discrimination and (4) for reasonable compensation. It is relevant, in this connection, to refer to the decision of the Supreme Court in *V.S.R. & Oil Mills* v. *State of Andhra Pradesh*[2]. In this case the appellants before the Supreme Court were supplied electricity by the State of Andhra Pradesh, the agreements between them prescribing the terms and conditions on which the said supply should be made to the appellant and one of the terms stipulating the rate at which the supply of electricity should be charged. On the State Government increasing the rates acting under section 3 of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949 by two notifications, the appellants challenged the validity of the notifications. The said section *inter alia* provided for controlling the price at which an essential article may be purchased or sold. The Supreme Court examined the question whether the impugned notifications increasing the rates were reasonable and in the interests of the general public, assuming for the purpose of the case that the right to receive the supply of electricity at the rates specified in the agreement was a right which fell within Article 19 (1) (*f*) or (*g*). No decision was given whether the right of the customer under the Electricity Act would fall under Article 19 (1) (*f*) or (*g*).

In the present case granting that the subscriber has some property in the telephone, let me examine whether any guaranteed freedom of the subscriber is affected. As a subscriber at best he is in the position of a renter of the telephone and a hirer of the attendant services, as the telephone is owned and served by the State. Certain rights that can go with ownership and have the characteristics of property have been carved out in his favour. He may claim protection for those rights, but the rights are *jura in aliena* and subject to the paramount rights of the owner. Now, apart from any statutory right can a hirer compel the owner to part with the thing hired at any particular rate? Can he compel the owner by legal process to accept lower charges? Has a tenant of a building a right to compel the landlord to reduce the rent except for any statutory provision in this regard? Subject to reasonable restrictions which the State may impose, an owner of property is entitled to exploit it to his maximum advantage. A landlord may complain of unreasonable restriction with reference to his right to property when there is drastic reduction in the rental rates. But I have never heard a tenant claiming that his fundamental rights are violated by an increase in the rates. The State may, in the interests of the

1. (1957) S.C.R. 801: (1957) S.C.J. 574 at 592.
2. (1965) 1 S.C.J. 318: (1965) 1 An.W.R. (S.C.) 31: (1965) M.L.J. (S.C.) 31: (1964) 7 S.C.R. 456: A.I.R. 1964 S.C. 1781.

public, intervene by appropriate legislation to protect the public from exploitation. Under Entry 34 in the Concurrent List a State has power to control the price and by law it may reduce rates. The State in this case is like any other owner of property. The question is not whether the State can claim fundamental rights, but is, whether a citizen can compel the State to part with or hire its property at any particular price or rate. Unless a legal right in this regard is established, one cannot say that there is violation of fundamental rights. Outside the provisions of the Telegraph Act which we have interpreted as enabling the levy only of reasonable rates, I cannot see any right in the subscriber to question the reasonableness of the rates. As the State can own property, it can exercise all rights relating thereto given or protected by law. If the telephone service is run in the private sector under rates regulated by the Government, manifestly the consumer cannot claim that his fundamental right under Article 19 (1) (*f*) is violated by high rates. He may only say that the rates have not been fixed according to the statutory provision. Does the fact that the service is run by the State make a difference and confer on the citizen a right in the property, fundamental in character, which he does not otherwise possess? If the right to acquire and hold the telephone is under the Telegraph Act, then where is the violation, if rates are claimed in due accordance with the provisions of the Act? The Courts are the constitutional guardians of both powers of the Legislature and of the rights of those affected by legislation. The American cases recognise the right of an owner of property to fix a price at which his property should be sold or used as an attribute of property itself and as such within the protection of the due process clause of the Federal Constitution. Relief was granted to owners of property on the V and XIV amendments to the Federal Constitution which guaranteed due process of law, the principle evolved from these two amendments being that no regulation by a unit of Government can reduce profits below the confiscatory level. In the States, the citizen's rights are protected from being exploited by monopolies, by commissions which by law regulate public utilities and are required to see that the rates are reasonable. In Corpus Juris Secundum, Vol. 86, at page 128, it is stated:

> "Where authority to regulate the rates to be charged for telegraph or telephone service, or the like, has been conferred by law on a public utility commission, a patron asserting that the rates prescribed by a company for its services are excessive cannot invoke the aid of a Court of equity, but must apply for a revision of such rates to the commission, except where contractual rights are involved, and except where the rates are applied in a discriminatory manner."

It is pointed out that generally individual subscribers have no direct or immediate interest in the rates prescribed. In England, with reference to nationalised industries, there are Consumers and Consultative Councils to protect the interests of consumers.

When invoking protection under Article 19 (1) (*f*) the subscriber cannot invoke the common law principle laid down by Lord Hale. The American case and the dicta of Lord Hale may provide a guide to the reasonableness of the rates where they are required to be so but cannot go further. Common law regulation of trade or business may be changed by statute and a person has no vested interest in any rule of common law. And here I would add the note of caution, which I should have done earlier, that we cannot readily and wholly take in the American utility rate cases—all in the private sector—or the principles laid down by Lord Hale, for guidance in this rather difficult and complicated region of law. Any unqualified application of these principles may lead to rather strange and anomalous consequences not in keeping with our Constitutional set up. First, I doubt whether Lord Hale ever meant that the principle he enunciated should apply to the Crown itself. The latter part of the extract from his thesis given supra refers to the public wharfs as licensed by the Queen. English Judges used Lord Hale's statement in a few cases, but had kept it well within bounds. It has never been interpreted as a principle which could limit the power of Parliament in the regulation of trade and

commerce, as in England Parliament is the sole Judge of constitutionality of its Acts. The American and English case law stems from the concept of franchise or privilege. The acquisition of a franchise on privilege was said to impose under the common law corresponding obligation on the holder to deal fairly with the public who would be affected by a monopoly. Under the English law, franchise means a grant made by the sovereign in exercise of the royal prerogative. "Franchise" is defined by Blackstone as "royal privilege or branch of the King's prerogative subsisting in the hands of a subject—Blackstone's 2 Com. 37. Under the American law, the doctrine got well established that, whilesome trades could be carried on by citizens as a matter of common law, there are others which could be carried on only if the State permits. Monopoly rights conferred by statutes came to be treated as in the nature of franchise in American Jurisprudence. In *California* v. *Central Pacific Railway Co.*[1], Bradely, J., explaining franchise, said :

"No private person can establish a public High Way or a public ferry or royal road, or charge tolls for the use of the same without authority from the Legislature direct or derived. These are franchises."

The concept of franchise developed in America has not been adopted in our Constitution. Article 19 (1) (*g*) does not make any distinction between common law trades which could be carried on by all persons and prerogative trades which could be carried on only under State grants. The right of a citizen to carry on any trade is subject only to such restrictions as would fall within the scope of Article 19 (6) and the State is empowered also to carry on trade and commerce under Article 298 and Article 19 (6). The law under our Constitution is fundamentally different from that laid down in the American decisions and, the concept of franchise and privileges having their origin in the prerogative of the Crown of England and recognized by the common law, by its very nature, can have no place in our Constitution. Except when enforcing or claiming relief under the statutory regulation of rates and prices, a citizen here cannot approach our Courts for the exercise of any equity jurisdiction or inherent power, for reduction of rates and prices. We have had no citation to that effect.

I now address myself to the reasonableness of the rates charged. As the matter has been considered at length by my Lord the Chief Justice, I am not elaborating on the same. The fixation of the impugned rates was preceded by an inquiry conducted by the Tariff Telephone Commission Committee in 1964. Its report has been made available to us. The report starts with the enumeration of the basis objective of tariff structure for telephone service, that it should earn adequate revenue for efficient operation and continuous growth of telephone service on a sound economic basis. The tariff was revised, it is said, on the basis of the Committee's report. Willoughby in his Constitutional Law of the United States, 2nd Edition, Vol. III at page 1704, says;

"As regards the matter of legislatively fixed rates, the judicial function extends no further, under American constitutional principles, than to determine whether these rates are so unreasonably low as to be unjust to the companies rendering the services and thus to operate, as to them, as a taking of property without due process of law. Such legislatively fixed rates may not be questioned by the Courts upon the ground that they are too high, and, therefore, oppressive to the public, for it is the peculiar province of a legislature to determine what is just and reasonable as regards the public. When, however, the Courts are called upon to examine the validity of rates fixed by administrative bodies acting under a legislative authority so to do, but under a legislative mandate that the rates so fixed shall be just and reasonable, the situation is a different one. Here, the Courts may, and, in fact, are obliged, when the matter is presented to them in proper form to examine these rates not only as regards their reasonableness and justness to the companies rendering the services, but as regards also their reasonableness or just-

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(1) 127 U. S. 1.

ness to the public. Thus, it is competent for the Courts to hold a given rates to be illegal because so low, under all the circumstances of the case, as not to yield a reasonable percentage return to the company upon the fairly valued property used by it. The Courts may also hold such an administratively determined rate to be so high as to be unduly oppressive or extortionate to the public. It is, however, to be noted that, in fact, the Courts have seldom, if ever, found it necessary to hold an administratively fixed rate invalid upon this last ground. However their power so to do has been repeatedly asserted."

The contention of Mr. T. R. Mani is that the Telephone Department has earned considerable surplus, profits ranging from 16.2 per cent. in 1959-60 to 19·1 per cent. in 1964-65 even under the old rates. Mr. Mohan Kumaramangalam has worked out the rates of return for the years adopting commercial accounting and has shown a return of 2.31 per cent. in 1963-64 and 3.34 per cent. in 1964-65. The actual figures regarding income and expenditure are not in dispute. The contention pressed by Mr. Mani seriously is that the percentage of return should be calculated without deducting from the surplus, funds set apart for capital expenditure and expansion. Another point made by Mr. Mani is that labour charges on expansion programmes should be treated as productive wages and capitalised and not treated as revenue charge. Per *contra* Mr. Mohan Kumaramangalam points out that, if the service is a private concern, a considerable part of the surplus would go towards income-tax and royalties. That being so, it is stated, it stands to reason that the Department can plough back into the service, for development and expansion, a sizable part of the surplus that would otherwise have gone towards taxes and royalties. It is shown that, if so done, the percentage of return would be just about the fair and reasonable return referred to in the American cases. The finances of the Department are the subject of budget proposals presented to Parliament. The revenue and expenditure of the department are placed before Parliament for discussion. Here we have a legislative prescription of rates, no doubt, fixed by the executive under statutory powers. We have to start with an initial presumption of reasonableness. True, the rates are only laid before Parliament and the contention is open that the protection offered is not as high as it ought to be. May be the present method of fixing rates, without a statutory right of hearing, to the consumers, is unsatisfactory. In England, public utility charges are subject to detailed examination and potential opposition by Consumers Councils and many of the public enterprises have a statutory duty to supply their products as cheaply as possible—*see* section 1 (6) of the Electricity Act, 1947, section 1 (8) of Gas Act, 1948 and section 2 (1) of Civil Aviation Act 1946. Here the responsibility to Parliament and Parliamentary vote of the estimate may be expected to secure the necessary social control of the rates in the interest of the public. Counsel are agreed that for efficient service, the enterprise must be run on commercial line and the rates must be framed and based on commercial principles. May be in a highly profitable public enterprise where the demand is high, there will be a veiled element of taxation in the surplus earned. On the materials now placed before us, considerable though they are, notwithstanding the several treatises and decisions of the United States Supreme Court on rate making in respect of public utility service referred to, do not think I can say that the rates are exorbitant or unreasonable. The reasonableness of rates may be referred either to the financial needs of the enterprise or to the necessity of consumers. The telephone service forms a category by itself as every expansion in the network and every improved facility adds to its utility for the individual subscriber. Fixation of rates, particularly in public utility concern, calls for harmonising conflicting demands. Having been taken through the figures, I agree with my Lord the Chief Justice that we cannot see our way to strike down or interfere with the impugned tariff upon any legal principle in the exercise of our jurisdiction under Article 226 of the Constitution. Neither the public utility rate principle, developed in the United States, nor any common law view of public utility rates, calls for holding that the charges now levied are unreasonably high or exorbitant or colourable device and so outside the power conferred under

section 7 (2) (a) of the Indian Telegraph Act. Nor is any fundamental right of the subscriber shown to be adversely affected by the rise in the rates.

It follows that the appeal succeeds.

V. S. *Case-law discussed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

P. S. Venkatachalapathy Iyer & Sons, through one of its partners Sri P. C. Mohanram .. *Petitioners**

v.

Messrs. Subramaniam Co. through one of its partners Sri T. R. Subburamu and others .. *Respondents.*

Negotiable Instruments Act (XXVI of 1881), sections 30 and 98 (b)—Interpretation—Dishonour of a bearer cheque—Liability of the drawer—Countermanding of the cheque—Sections 30 and 98 (b) if could be read together.

Section 30 of the Negotiable Instruments Act says that the liability of a drawer in the case of dishonour of a cheque can only be in a case where the notice of dishonour has been given to the drawer as hereinafter provided. Section 98 deals with cases where such notice of dishonour is unnecessary and one such case is that if the drawer has countermanded the payment no such notice of dishonour is necessary in order to charge the drawer. That is the case here. Further this is a casewhere negotiable instrument is a bearer cheque. Considerations which might arise in the case of an account payee cheque or a crossed cheque cannot easily be applied to a case of a bearer cheque. It is practically issued by a drawer to the drawee for the purpose of immediate negotiation and without any further operation of mechanics attached to it. It is therefore difficult to agree with the contention that section 98 (b) ought to be read independently of section 30. On the other hand, section 98 (b) is an exception to section 30 and would certainly have to be read together.

Petition under section 25 of Provincial Small Cause Courts Act praying the High Court to revise the decree of the Sub-Court, Madurai in S.C. No. 118 of 1965, etc.

O. V. Baluswami and *Manicka, K. Ramalingam,* for Petitioner.

S. Gopalaratnam and *P. N. Venugopalan,* for Respondents.

The Court delivered the following

JUDGMENT.—No question of law or error of jurisdiction arises in both the civil revision petitions. No doubt the learned Subordinate Judge, Madurai, has committed certain errors in characterising a payee of a holder in due course which is unknown to law merchant. That apart, I have looked into the records and heard Mr. O. V. Baluswami, learned Counsel for the petitioner, who is the first defendant in the action. Both the revision petitions arise out of suits filed by the first respondent against the petitioner as the first defendant and the second respondent as the second defendant. The parties will hereinafter be described as plaintiffs and defendants. The first defendant had dealings with the second defendant and he was admittedly advancing monies in connection with such business dealings. On 2nd December, 1964, the first defendant gave a post-dated cheque dated 5th January, 1965, in one case and on 7th December, 1964 a similar post-dated cheque dated 12th January, 1965, in the other case. The second defendant, who had to buy on credit yarn from the plaintiffs passed on both the cheques to the respective plaintiffs and sought liquidation in part of the amounts by then due by him to the

* C.R.P. Nos. 718 and 1745 of 1967. 28th March, 1969.

respective plaintiffs. The plaintiffs in each of the above actions presented the cheque so handed over by the second defendant for encashment. It may at once be noted that both the cheques were bearer cheques. When the cheques were presented by the plaintiffs as holders in due course, the cheques were returned with the endorsement "stop payment effected by the drawer." It is not in dispute, that the drawer, namely, the first defendant, of both the cheques stopped such payment in both the cases. It is contended that he had to stop such payment because the second defendant was not in a position to supply the towels which he had to manufacture and deliver over to him in return of the advances so received by the second defendant from the first defendant. But this story was not believed by the Court below. The first defendant having thus countermanded the cheques, ultimately went into the hands of each of the plaintiffs in the actions as above and were dishonoured, the plaintiffs, independently had recourse to Court for realisation of their amounts due on the strength of the dishonoured cheques. The first defendant curiously raised the plea that the plaintiffs were not holders in due course of the negotiable instrument in question and in any event there was no consideration for the endorsement or transfer made by the second defendant in favour of each of the plaintiffs. On all the questions of fact as above the Court below found against the first defendant.

Mr. Baluswami, learned Counsel for the petitioner (first defendant) however, contends that the plaintiffs in each of the cases cannot be deemed to be a holder in due course and no notice of dishonour as prescribed under section 30 of the Negotiable Instruments Act having been given, the suit is not maintainable. He no doubt fairly invited my attentions to section 98 (*b*) of the Act, but, however, contends that each section operates respectively in their field and the content and effect of one cannot be telescoped into the other and therefore the plaintiffs in each of the civil revision petitions ought to have been non-suited.

I am unable to agree with this contention. Section 30 provides an answer for the question posed. Section 30 says that the liability of a drawer in the case of dishonour of a cheque can only be in a case where the notice of dishonour has been given to the drawer as *hereinafter provided*. Learned Counsel did not bring to my notice any other provision in the Negotiable Instruments Act, to substantiate this limitation expressly provided for in section 30. The only place where a provision as contemplated by section 30 has been made appears to be in section 98. Section 98 deals with cases where such notice of dishonour is unnecessary and one such case is that if the drawer has counter manded the payment, no such notice of dishonour is necessary in order to charge the drawer. That is the case here. Further this is a case where the negotiable instrument is a bearer cheque. Considerations which might arise in the case of an account payee cheque or a crossed cheque cannot easily be applied to a case of a bearer cheque. It is practically issued by a drawer to the drawee for the purpose of immediate negotiation and without any further operation of mechanics attached to it. I am, therefore, unable to agree with the learned Counsel for the petitioner that section 98 (*b*) ought to be read independently of section 30. On the other hand, section 98 (*b*) is an exception to section 30 and would certainly have to be read together.

I have already found that questions of fact have been found against the petitioner and he cannot canvass the correctness of such findings even though the revision petitions are under section 25 of the Provincial Small Cause Courts Act. In any event, I have considered such factual details also, and I am satisfied that the countermanding of the cheque in each of these cases by the first defendant is without any justification whatsoever and the plaintiffs in each of the suits as above did not have any notice of such countermanding before they presented the cheques for payment and that the cheques were accepted by them, in part payment of the debts due by the second defendant towards supplies of yarn made by the plaintiffs to the second

defendant. In these circumstances, the judgments of the Court below are correct and the civil revision petitions are dismissed with costs in C.R.P. No. 718 of 1967.

V.M.K. ——— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

V. Subramaniam .. *Petitioner**

Criminal Procedure Code (V of 1898), section 145—Order under—Disobedience—Mens rea—No likelihood of breach of peace—Section 188, Indian Penal Code (XLV of 1860).

On the question whether in the facts and circumstances of the case disobedience of the order passed under section 145 Criminal Procedure Code entailed one or other of the three consequences mentioned in section 188 of the Indian Penal Code,

Held, that before a person could be punished for disobedience of an order under section 145 Criminal Procedure Code, there should be evidence that this act of disobedience caused or tended to cause a riot or affray. But there is no such finding in the present case that the act of the petitioner caused or tended to cause riot or affray. The order under section 147, Criminal Procedure Code, was passed on 13th November, 1962 and the disobedience complained of was nearly three and half years later on 12th May, 1966. Having regard to the long interval between the date of the order and the date of disobedience of the same, the likelihood of the breach of the peace being caused by reason of the disobedience of the order could not be presumed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the District Magistrate (*J*) South Arcot at Cuddalore made in C.A.No. 217 of 1966 on his file dated 28th October, 1966 (C.C.No. 2832 of 1966 on the file of the Court of the Sub Magistrate, Tindivanam).

C. R. Venkatanarasimahan, for Petitioner.

R. Veeramani, for Public Prosecutor for State.

K. Swamidurai, for P.W. 1.

The Court made the following

ORDER.—Petitioner Subramaniam was convicted under sections 447, 379, and 188 Indian Penal Code, and sentenced to undergo R.I. for two months on each of the first two counts and simple imprisonment for one month on the last count, by the Sub-Magistrate, Tindivanam, and the sentences were ordered to run concurrently. But the learned District Magistrate, South Arcot, on appeal set aside the convictions under sections 447 and 379, Indian Penal Code, and the sentences imposed in respect of the same, but confirmed the conviction of the petitioner only under section 188, Indian Penal Code, and modified the sentence to one of fine of Rs. 100 in default to undergo simple imprisonment for one week.

The complaint in this case was preferred by the Sub-Divisional Magistrate, Villupuram, on the ground that an order passed in M.C.No. 189 of 1962 on the file of that Court on 13th November, 1962 was disobeyed by the petitioner on 12th May, 1966. The petitioner was the 10th respondent in the proceedings under section 145, Criminal Procedure Code, and he claimed item-8 in the schedule of properties in the said petition, which is the subject matter of the present case, as having been taken by him on lease from the original owner, Padmanabha Gramani. It should be noted that the claims which led to civil disputes and the proceedings under section 145, Criminal Procedure Code, were between persons who claimed title as heirs of the said Padmanabha Gramani. In fact, an order of interm injunction was passed by the High Court against the petitioners in the proceedings under section 145,

* Cr. R.C. No. 288 of 1967.
Cr.R.P. No. 285 of 1967. 22nd November, 1968.

Criminal Procedure Code, Sri C.K. Venkatanarasimhan appearing for the petitioner questioned the validity of the order under section 145, Criminal Procedure Code, on the above materials; but in my opinion, he is not entitled to do so as he failed to seek relief by taking proceedings against the said order, which has become final. Sri C.K. Venkatanarasimhan has also taken a ground that the order under section 145, Criminal Procedure Code, has not been promulgated. But he fairly conceded that he could not urge such a ground as he was a party who took part in the proceedings in which the order was passed against him and others.

The main contention to be considered in this case is whether the disobedience of the order passed under section 145, Criminal Procedure Code, entailed one or other of the three consequences mentioned in section 188, Indian Penal Code.

The first consequence mentioned in section 188, Indian Penal Code, refers to such disobedience which 'causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any persons lawfully employed'. Obviously, this clause could have no application to the order in question. It would generally apply to cases where orders passed have to be enforced by quasi officials directly or through others, lawfully employed by them. It is not necssary to state who all could be considered as coming within the clause 'persons lawfully employed'. The earlier part of third para of section 188, Indian Penal Code, refers to the second consequence, namely, 'such disobedience' which 'cause or tends to cause danger to human life, health or safety'. This will apply to cases of disobedience of orders passed under Chapter X of the Criminal Procedure Code to prevent offences falling under Chapter XIV of the Indian Penal Code relating to public nuisances and similar cases. The third consequence referred to in the latter part of the third para of section 188, Indian Penal Code is one relevant to this case, namely, such disobedience of the order which 'causes or tends to cause a riot or affray'.

The order under section 145, Criminal Procedure Code, could be made only when the dispute as to immovable property is 'likely to cause breach of the peace'. If such an order is disobeyed and it "causes or tends to cause a riot or affray', the person disobeying such order ought to be punished as the object of the order is to prevent breach of the peace. But before a person could be punished for disobedinece of an order under section 145, Criminal Procedure Code, there should be evidence and a definite finding passed on that evidence that his act of disobedience caused or tended to cause a riot or affray. I have already pointed out that there is no such finding by either of the Courts below that the act of the petitioner caused or tended to cause riot or affray. The order under section 145, Criminal Procedure Code, was passed on 13th November, 1962 and the disobedience complained of was nearly three and half years later on 12th May, 1966. Hving regard to the long interval between the date of the order and the date of disobedience of the same, the likelihood of the breach of the case being caused by reason of the disobedience of the order could not also be presumed. The Courts below have failed to note that mere disobedience of an order promulgated by a public servant is not in itself an offence unless it entails one or other of the consequences mentioned in section 188, Indian Penal Code.

The learned District Magistrate has acquitted the petitioner in respect of both the offences under sections 447 and 379, Indian Penal Code. So far as the offence punishable under section 379, Indian Penal Code, is concerned, he was of the view that the ingredients of the said offence have not been made out'. He has observed that, 'it cannot at all be said, having regard to the facts of this case, that the appellant cut and carried away the casuarina from the thope with any dishonest intention'. He has observed that, it is obvious that he had done so in an attempt to set up his title to the casuarina standing threon, however ill founded his claim may be'. This finding itself is inconsistent with the *mens rea* required namely, knowingly disobeying an order so as to result in one or other of the consequences, mentioned in section 188, Indian Penal Code. It should be noted that the order was passed

about 3½ years prior to the occurrence in this case. I looked into the oral evidence adduced in this case. P.W. 1 Jagadeesa Gramani has merely spoken to the fact that the trespass as well as the removal of the casuarina trees was about 10 or 15 days after the cyclone and that he came to know of the same by a letter received by him about 1¼ months prior to his giving evidence. P.W. 2 Kannan, P.W. 3 Perumal and P.W. 4 Manickasamy who all speak to the removal of the casuarina trees by the petitioner, have not even whispered that there was any likelihood of the breach of the peace.

For the forgoing reasons, the conviction of the petitioner under section 188, Indian Penal Code, cannot be sustained and it is set aside. The petitioner is acquitted even in respect of the charge under section 188, Indian Penal Code, and the fine amount, if collected is ordered to be refunded to him.

The Criminal Revision Case is allowed.

V.M.K. — *Criminal Revision case allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. PALANISWAMY.

K. Venugopal .. *Petitioner**

v.

P. S. Doyal Prasad .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 7 and 10 (2) (i)—Scope—Tenancy agreement—Stipulation that the tenant to pay rent in advance on the first of every month, if violates the provisions of the Act.

The tenant of a non-residential building (petitioner) executed the letter Exhibit P-1 agreeing to pay the landlord the rent in advance by the first of every month. Exhibit P-1 does not show that the tenant paid any amount by way of advance rent. Is the stipulation violative of the provisions of the Madras Buildings (Lease and Rent Control) Act, 1960.

Held, that the amount payable by way of advance, as contemplated under section 7 of the Act, is distinct from the rent which a tenant, as in the instant case is liable to pay for every month. In this section, the Legislature has specifically provided for adjustment of the advance. Such adjustment is out of place where in a case like this, the tenant is liable to pay rent at the commencement of every month. Therefore the stipulation in Exhibit P-1 for payment of rent in advance on the first of every month does not violate the provisions of the Act.

Petition under section 25 of the Madras Buildings Lease and Rent Control Act, 1960 praying the High Court to Revise the order of the Court of the Small Causes, (IV Judge) Madras dated 6th September, 1967 and made in H.R.A. No. 68 of 1967 (H.R.C.No. 1697 of 1966 on the file of the Court of Small Causes (VI Judge) Madras).

Balasubramaniam, N. M. Manivarma, M. S. Ethiraj and *A. S. Udyashankar*, for Petitioner.

M.A. Ghatala, for Respondent.

The Court delivered the following

JUDGMENT :—This revision has been filed under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as the Act) by the tenant of a non-residential building against the order of eviction passed by the Rent Controller, Madras and affirmed on appeal by the appellate authority on the ground that he had committed wilful default in the payment of rent at the rate of Rs. 25 per month from 1st June, 1964 to 28th February, 1966. The premises in

* C.R.P. No. 68 of 1968. 1st April, 1969.

question originally belonged to one Rathna Bai, to whom the petitioner had executed the latter Exhibit P-1 on 1st March, 1957 agreeing to pay the rent in advance by the first of every month. The respondent-landlord purchased the premises from Rathna Bai, and thereafter, the petitioner made an endorsement of Exhibit P-1 on 1st July, 1963 agreeing to pay rent at the rate of Rs. 25 per month as against Rs. 20 payable previsouly under the terms contained therein. Alleging that the petitioner had committed wilful default in the payment of rent for the months of April, to May, 1964, the respondent applied for eviction of the petitioner in H.R.C.No. 2733 of 1964 on the file of the Rent Controller, Madras. The Rent Controller found that there was wilful default in the payment of rent for the month of April, 1964 and directed eviction. Against that order, the tenant-petitioner filed H.R.A. No. 223 of 1965 on the file of the Court of Small Causes, Madras. The Appellate Authority reveresed the decision of the Rent Controller and held that the default was not wilful. In that view, the petition for eviction was dismissed. That order was passed on 28th August, 1965. The respondent alleged in the petition, out of which this revision has arisen, that the petitioner committed wilful default from 1st June, 1964 to 28th February, 1966. The petitioner contended that he tendered the rent by money order, that the tender was refused by the respondent and that he had not committed default. The Rent Controller held that under the terms of the lease, the rent was payable by the first of every month for that month, that the tenders made by the petitioner was informed of his defaulty by notice, that in spite of such reminder, he committed default and that therefore the default was wilful. He held that from 1st June, 1964 to 28th February, 1966 the petitioner committed wilful default. In the appeal preferred by the tenant, the appellate authority agreed with the Rent Controller and dismissed it.

Mr. Balasubramaniam, appearing for the petitioner, contended that the terms agreed upon by the petitioner under Exhibit P-1 are not in accordance with the provisions of the Act, that what was stipulated was payment of advance rent and that in as much as such a stipulation runs during the entire period of tenancy it is invalid. He developed his argument by contending that under the provisions of the Act, the landlord is entitled to claim only one month's rent as advance and that the contract between the parties as evidenced by Exhibit P-1 violates that mandatory provision, I am convinced that though this argument is ingenious, it is devoid of substance. Section 10 (2) (i) of the Act fixes the time for payment of the rent. According to that section, the tenant is liable to pay or tender the rent due by him in respect of the building within 15 days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable. This provision contemplates an agreement between the landlord and tenant as regards the time for payment of the rent. There is nothing to show that such time for payment should be only after the expiry of the month for which rent is payable. Parties may stipulate for payment of the rent on the first of the month for which rent is payable or during the period of the month for which the rent is payable or at the end of that particular month. If any date is fixed, the tenant is bound to pay the rent within 15 days there after. The Legislature had made provision for a case where there is no such agreement between the parties as regards the date of payment. In such a case, the rent is payable by the last day of the month next following that for which rent is payable. The question is whether in a case where the agreement between the parties is for payment of the rent on the first of the month for which rent is payable, such a stipulation can be said to violate the provisions of the Act. Section 7 of the Act gives power to the landlord to receive or stipulate for payment of an amount not exceeding one month's rent by way of advance. Reliance is placed, upon this provision on behalf of the petitioner in support of the argument that what is required to be paid by the petitioner under the terms of Exhbit P-1 amounts to payment of more than one month's rent in advance as he is required to pay every month rent in advance. The fallacy underlying this argument is apparent. The amount payable by way of advance, as contemplated under section 7, is distinct from the rent which a tenant, as in the instant case, is liable to pay for every month.

The amount paid by way of advance is to be kept by the landlord to be adjusted or to be refunded to the tenant on the termination of the tenancy. But what a tenant, as the petitioner in this case, is liable to pay is rent for each month though the rent is paid before the expiry of the month. Therefore such a payment cannot be termed as advance within the meaning of section 7. If the rent is paid on the first of every month, the liability of the tenant to pay rent for that particular month is discharged, and his liability arises only on the first of the next following month for payment of the rent for the following month. He is not entitled to say that what he had paid on the 1st of the previous month is advance and that he is not liable to pay rent for the subsequent month. In section 7 of the Act, the Legislature has specifically provided for adjustment of the advance. Such adjustment is out of place where in a case like this, the tenant is liable to pay rent at the commencement of every month. It may also be noted in this connection that Exhibit P-1 does not show that the petitioner paid any amount by way of advance rent. That is obviously the reason why the parties stipulated that the petitioner should pay every month's rent in advance on the first of that particular month. I therefore reject the contention urged on behalf of the petitioner that the stipulation in Exhibit P-1 for payment of rent in advance on the first of every month violates the provisions of the Act.

In as much as the rent is payable as per Exhibit P-1 on the first of every month for that month, the rent should be paid before the 15th of every month according to section 10 of the Act. Exhibit R-3 series are six money order coupons sent by the petitioner tenant and refused by the respondent-landlord. They cover the period from September, 1965 to February, 1966. Those remittances were made after the due date. On 1st November, 1965, the respondent landlord issued the notice, Exhibit R-1 to the petitioner reminding him of his liability to pay the rent on the first of every month of and telling him that he was constantly committing default. In spite of that notice and in spite of the prior eviction petition filed by these respondent, the petitioner violated the undertaking given in Exhibit P-1 did not pay or tender the rent within time. The period of such default was indeed long and the only inference possible is that the default was wilful. Both the Courts below were, therefore, right in holding that the petitioner committed wilful default.

In the result, the petition fails and is dismissed with costs. The petitioner is given two months' to vacate.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE S. GANESAN.

Doraipandi Konar .. *Petitioner**

v.

P. Sundara Pathar .. *Respondent.*

Madras Building (Lease and Rent Control) Act (XVIII of 1960), *section* 2 (7) *and* 22 *and Transfer of Property Act (IV of* 1882), *section* 108 (f) *and* (m) *Lease of house property—Repairs—Liability for cost—Rent Control Act—Complete Code excluding the Central Act—"Repairs and Improvements"—Distinction—Flooring and wall made up of mud—Demolition Cement floor and brick walls put up by tenant—Not repairs—Landlord not liable to meet cost—Contract Act (IX of* 1872), *section* 70*—Applicability—Words and Phrases—Repairs—Improvements".*

The flooring and walls of the tenant's portion were made of mud and the premises had a common thatched roof with the other two portions of the building. The tenant renewed the entire common thatched roof, demolished to old mud walls and put up brickwalls instead on three sides and laid a new cement floor instead of the old mud floor. The landlord unsuccessfully obstructed the tenant from carrying out the operations. On the question of the liability for the cost of such operations, the Subordinate Judge in appeal held that the landlord was liable for the entire cost. Hence the revision at the instance of the landlord.

* C.R.P. No. 2416 of 1967. 8th April, 1969.

Held, the landlord is not liable for the cost of the work.

The Madras Buildings (Lease and Rent Control Act (XVIII) of 1960) is a complete code in regard to the rights and liabilities of the landlord and tenant in respect of repairs to the building and it is not permissible for a landlord or a tenant in cases governed by the Act to fall back upon the provisions of section 108 of the Transfer of Property Act or the contract of tenancy for determining their rights and liabilities in respect of repairs to the buildings.

Section 22 of the Madras Act (XVIII of 1960) clearly implies that there is a duty on the part of the landlord to make necessary repairs to the building within a reasonable time after notice by the tenant; and section 2 (7) while setting out the meaning of the term 'repairs' clearly excludes from the definition additions, improvements or alterations except in so far as they are necessary to carry out such restoration.

While the Landlord under Madras Act (XVIII of 1960) has an obligation to make necessary repairs to the property, section 108 (*f*) Transfer of property Act imposes an obligation only on the tenant to carry out certain repairs and casts an obligation on the landlord to carry out only such repairs "which he is bound to make to the property." Which means only those repairs which the landlord is bound by an express contract to make.

Section 2 (7) of the Madras Act defining the word "repairs" lays emphasis on the word 'restoration' and enacts that repairs do not include additional improvements or alterations except in so far as they are necessary to carry out such restoration. The term "improvements" has not been defined in the Act and the meaning and import of the term must be gathered from the dictionaries and decisions.

The basic idea underlying the concept of repairs is restoration of a building to its original condition. This implies that the old structure is retained and is renovated from the damaged conditions to its original sound state. Repair always involves an element of renewal, but renewal of the whole and substantially the whole cannot be termed repair proper. Where the building is completely demolished and a new structure put instead, it would normally be reconstruction, not repairs proper. In addition material alteration or anything which substantially improves a thing in value from the original condition except in so far as it is necessary to carry out such restoration cannot be said to be merely repair of that thing, it will be bringing into existence an altered thing, an improved thing, a new thing for all intents and purposes.

Held on facts What the tenant has done amounts to a reconstruction and not mere repair as contemplated by the Act (XVIII of 1960). Assuming that it is repairs it has been done without the previous consent of the Rent Controller and hence the cost cannot be recoverred from the Landlord. Even if the case falls under section 108 of the Transfer of Property Act it is not the case of the tenant that there is any term in the tenancy agreement casting an obligation on the landlord to effect any repairs to the building. In addition section 108 does not confer any right on a tenant to effect a reconstruction of or improvements to the building to claim compensation.

Also Held, section 70 of the Contract Act cannot be legitimately invoked since it is difficult to say that the act of renovation done by the tenant was lawfully done for the landlord. In order to merit compensation under section 70 of the Contract Act services rendered must have been acquiesced in by the other party. It cannot justify the officious obligations in respect of services which the person sought to be charged with did not wish to have rendered.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree and judgment of the Court of the Subordinate Judge, Madurai, dated 21st October, 1967 and passed in A.S. No. 221 of 1967 (O.S. No. 222 of 1966 on the file of the D.M.C., Melur).

S. Kothandaramanyanar, for Petitioner.

V. Balasubramaniam, V. Kunchithapatham and *N. V. Balasubramaniam*, for Respondent.

The Court delivered the following

JUDGMENT.—The landlord is the revision petitioner herein and he is aggrieved that the Subordinate Judge of Madurai had by his judgment in A.S. No. 221 of 1967 reversed the judgment of the District Munsif, Melur, in O.S. No. 222 of 1966 and decreed the suit for a sum of Rs. 835-30 proved to have been spent by the respondent tenant.

The respondent is running a tea shop in the eastern and northern portion of a building at a monthly rent of Rs. 40. The flooring of the respondent's portion was made of mud and the walls also similarly were made of mud; and the premises have a common thatched roof with the other two portions of the building As the petitioner landlord refused to renovate the roof which was leaking in the rains and to repair the mud floor and to put up walls in the place of the mud walls which had fallen in spite of his requests and a notice, the respondent renewed the entire thatched roof which was common to his premises as well as the other portions of the building, demolished the old mud walls and put up brick walls instead on three sides and laid a new cement floor instead of the old mud floor. The petitioner unsuccessfully obstructed the respondent from carrying out the said operations while they were going on and later refused to meet the charges amounting to Rs. 835-30 proved to have been spent by the respondent.

The learned District Munsif is of opinion that the respondent was entitled if at all, only to replace the old mud walls with new mud walls and to repair the mud floor and had no right to replace the mud walls with a brick wall and the mud floor with a cement floor but upheld the respondent's act in renovating the entire thatched roof and he held that the respondent would be entitled to recover, if at all only a sum of Rs. 532-87P. But he found, that, as the respondent had not applied to the Rent Controller for permission to replace the roof, walls and mud under section 22 of the Madras Buildings (Lease and Rent Control) Act, 1960, he is not entitled to recover any amount and accordingly dismissed the entire suit. He is of opinion that the provisions of section 108 (*f*) of the Transfer of Property Act which relate to the rights of a lessee in case of repairs not done by the lessor within a reasonable time of notice cannot be invoked, after section 22 had been enacted in the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960).

The learned Subordinate Judge of Madurai however is of opinion that section 22 of the Act is not a complete code by itself, defining the rights and liabilities of the lessors and lessees, that section 108 of the Transfer of Property Act continues to apply to cases like the present one, that what the respondent had effected were only repairs and not a reconstruction of the building and that, as the petitioner landlord has refused to carry out the repairs, the respondent was entitled to recover the entire amount claimed by him. Hence the revision. It may be observed that he, however, repelled the contention that section 70 of the Indian Contract Act was applicable to this case.

The first question which arises for consideration is whether the respondent is entitled to base his claim upon the provisions of section 108 (*f*) of the Transfer of Property Act, ignoring the provisions of section 22 of the Madras Buildings (Lease and Rent Control) Act. In order to appreciate the contention of the learned Counsel, it is desirable to set out the relevant provisions of these two Acts.

"Section 2 (7) of the Rent Control Act defines repairs as 'the restoration of a building to a sound or good state after decay or injury, but does not include additions, improvements, or alterations except in so far as they are necessary to carry out such restoration' ".

The provisions of section 14 (1) in so far as they deal with repairs read thus :—

"Notwithstanding anything contained in this Act, but subject to the provisions of sections 12 and 13, on an application made by a landlord, the Controller shall, if he is satisfied—

(*a*) that the building is *bona fide* required by the landlord for carrying out repairs which cannot be carried out without the building being vacated; pass an order directing the tenant to deliver possession of the building to the landlord before a specified date."

Section 22 in so far as it relates to ordinary buildings reads thus :

"If a landlord fails to make necessary repairs to the building within a reasonable time after notice is given by the tenant in the case of any other building the controller may direct on an application by the tenant that such repairs may be made by the tenant and that the cost thereof may be deducted by the tenant from the rent payable for the building; Provided that the cost of repairs, and the deduction thereof which the Controller may authorise shall not exceed in any one year one-twelfth of the rent payable in respect of the building for that year."

Section 108 of the Transfer of Property Act states thus :

"In the absence of a contract or local usage to the contrary, the lessor and the lessee of movable property, as against the one another, respectively, posses, the rights and are subject to the liabilities mentioned in the rules next followings or such of them as are applicable to the property leased :

(*B*) Rights and liabilities of the lessee. (*f*) if the lessor neglects to make within a reasonable time after notice, any repairs which he is bound to make to the property, the lessee may make the same himself, and deduct the expense of such repairs with interest from the rent, or otherwise recover it from the lessor; (*m*) the lessee is bound to keep, and on the termination of the lease, to restore, the property in as good condition as it was in at the time when he was put in possession, subject only to the changes, caused by reasonable wear and tear or irresistible force, and to allow the lessor and his agents, at all reasonable times during the term, to enter upon the property and in inspect the condition thereof and give or leave notice of any defect in such condition; and, when such defect has been caused by any act or default on the part of the lessee, his servants or agent, he is bound to make it good within three months after such notice has been given or left."

The provisions of section 22 of Act XVIII of 1960 clearly imply that there is a duty on the part of the landlord to make necessary repairs to the building within a reasonable time after notice by the tenant; and section 2 (7) of Act XVIII of 1960 while setting out the meaning of the term "repairs" clearly excludes from the definition additions, improvements or alterations except in so far as they are necessary to carry out such restoration. I may add that the provisions of section 108 (*f*) of the Transfer of Property Act refer to only cases of repairs to be done by a landlord, and, by implication, exclude additions, improvements or alterations from his obligation in the same manner as had been done by Act XVIII of 1960.

There is however one significant difference between these two facts and it is this. While the landlord under Act XVIII of 1960 has an obligation to make necessary repairs to the property, section 108 of the Transfer of Property Act imposes an obligation only on the tenant to carry out certain repairs and casts an obligation on the landlord to carry out only such repairs *which he is bound to make to the property.* The word "any repairs which he is bound to make to the property" found in section 108 (*f*) of the Transfer of Property Act have been interpreted by the Courts to mean only those repairs which the landlord is bound by an express contract to make.

Section 108 (*m*) of the Transfer of Property Act contemplates two implied covenants on the part of the tenant: (1) to keep the property in repair, *i.e.*, to maintain the property in the same condition at all times during the whole term of the lease and (2) to restore in repair, *i.e.*, to restore the premises in as good a

condition as he found the property. This obligation does not cover cases of damage caused by friction of the air, exposure and ordinary use and also cases of damage due to an extraordinary cause, such as storm, flood or accidental fire. Reading sections 108 (*f*) and (*m*) together the position is clear that the lessor is under no liability to repair in the absence of an express contract making him liable.

It thus appears that, in cases governed by section 108 of the Transfer of Property Act, neither the tenant nor the landlord is bound to carry out repairs caused by reasonable wear and tear or even by irresistible force and that the tenant is liable to rectify only those defects which have been caused by any act or default on his part or on the part of his servants or agents. Under the Act XVIII of 1960, it appears however that repairs which are necessitated by reasonable wear and tear or irresistible force have to be carried out by the landlord.

The second difference lies in this. While under the Transfer of Property Act, in the case of repairs which the landlord was bound to make under express covenant, the lessee may make the same himself after notice to the landlord and deduct all the expenses he had incurred in respect of such repairs with interest from the rent or otherwise recover it from the lessor under Act XVIII of 1960, the tenant cannot make the repairs by himself and cannot deduct all the expenses of such repairs with interest from the rent, or otherwise recover it from the lessor. In such cases, he is bound to apply to the Rent Controller for directions and when the landlord refuses to make such repairs after request and can make the repairs only on permission by the Rent Controller and the cost of the repairs which can deducted by the tenant from the rent cannot exceed one month's rent.

On a comparison of the provisions of the Transfer of Property Act and Act XVIII of 1960, I have no doubt in my mind that the Madras Legislature had intended the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) to be a complete code on the rights and liabilities of the landlord and tenant in respect of repairs to the building and that it is not permissible for a landlord or a tenant in cases governed by Act XVIII of 1960 fall back upon the provisions of section 108 of the Transfer of Property Act or the Contract of Tenancy for determining their rights and liabilities in respect of repairs to the building. The provisions of Act (XVIII of 1960 appear to be carefully designed and worded so as to cover all the important aspects of the problems relating to repairs to the building; and it is difficult to say that the Act XVIII of 1960 had left out any aspect relating to repairs untouched, leaving the parties to have their rights settled under the Transfer of Property Act or the Contract of Tenancy in respect of "repairs". It names the landlord as the person who has to carry out the repairs and comprehensively sets out the nature of the repairs he is bound to carry out to the building, the circumstances under which the tenant can get the repairs done and the extent of compensation which he will be entitled to if he carries them out with his own funds. It is salso sets out the limit of the landlords obligation to effect repairs and excludes additions, improvements, and alterations from that category.

The learned Subordinate Judge has relied on the decision of Mack, J., in *Ramakrishna Mudaliar* v. *Munafi Shaib*[1], and I have seen the original orders itself. That was a case under the Madras Buildings (Lease and Rent Control) Act XXV of 1949 and the decision is to the effect that section 11 (2) of that Act appears to have been enacted in order to give some protection to tenants in occupation of houses without the safeguard of a lease agreement with a specific covenant to repair to obtain relief from the landlords who negligently refuse to do any repairs and sometimes use this as a weapon for the purposes of vacating tenants by making them so uncomfortable that they vacate the premises and that a tenant who has a lease agreement with a specific covenant to repair is not fettered or restricted by section 11 (2) of Act XXV of 1949 and can enforce his covenant to repair under the ordinary law

1. (1955) 1 M.L.J. 62 (Short Notes).

through ordinary Courts. Mack, J., has pointed out that in *Mohamed Unny* v. *Unniri*[1], a Bench of this Court had held that the jurisdiction of a civil Court to entertain a suit by a landlord for eviction of a tenant and to pass a decree therein is not expressly or impliedly taken away by the provisions of Act XXV of 1949.

If Mack, J., had intended to lay down as an absolute rule that the terms of a tenancy agreement will override the specific provisions of this Act in all cases even on matters specifically dealt with by them, I must say that I respectfully disagree; in any case, I am clear that the decision cannot apply to Act XVIII of 1960. I am willing to concede that, where the Rent Control Act has not made any provisions in respect of certain rights and liabilities of the tenant and the landlord in certain matters, and had left them open and untouched, it would be open to them to fall back upon their express covenants for enforcement of such rights and liabilities, or on the provisions of the Transfer of Property Act for that purpose, in case there are no such agreements of tenancy; but I am clear that the express covenants contained in the agreements of tenancy cannot prevail in respect of rights and liabilities for which specific provision has been made in the Act and which have been clearly defined there. In such case it is plain that the Legislature had clearly intended that the provisions of the Act in respect of the said rights and liabilities shall bind the tenant and the landlord and shall prevail. Admittedly there is no general saving clause in the Rent Control Act of 1960 to the effect that the provisions of the Act are subject to the contracts of tenancy, on the other hand, the Legislature has, wherever it thought fit that the rights and obligations found in the tenancy agreement should be preserved, said so in plain terms and preserved such rights and obligations by enacting a special section or sub-clause to that effect. For instance, while dealing with eviction, section 10 (3) (*d*) specifically provides that where a tenancy is for a specified period agreed upon between the landlord and the tenant, the landlord under section 10 (3) shall not be entitled to apply under this sub-section before the expiry of such period. It is however found that a landlord is given the right to seek, for eviction on grounds like wilful default in the payment of rent, etc, as contemplated by section 10 (2) in such cases. The intention of the Legislature is thus clear and it cannot therefore be now seriously urged that the Act XVIII of 1960 applies only to cases where there are no contracts of tenancy and that the rights and obligations secured by the contracts will override the provisions of the Act and can be enforced in spite of them.

In the second place, it appears to me clear that it would be inequitable to permit a tenant or a landlord to take advantage of some of the provisions of the Act which are more favourable to them than the express terms of the contract of tenancy and to look to the terms of the tenancy regarding other aspects in respect of which the provisions of the Act are less favourable to them. I do not think that Courts of justice should permit such injustice and inequity.

Mack, J. has referred to the fact that this Court has in *Mohamed Unny* v. *Unniri*[1], held that the jurisdiction of a civil Court to entertain a suit by a landlord for eviction and to pass a decree has not been taken away by the provisions of the Rent Control Act. But then, it is obvious that such a right to have recourse to Court for obtaining a decree was not inconsistent with the provisions of that Act. As pointed out in that judgment itself, the jurisdiction to pass a decree of a civil Court was not expressly or impliedly taken away by the provisions of that Act. This decision *Mohamed Unny* v. *Unniri*[1], cannot therefore lend any serious support to the proposition advanced by Mack, J.

I also find that in *Hewitt* v. *Rowlands*[2], an English Court has held as follows :—

" An obligation on the part of the landlord to do any repairs, which was a term of the contractual tenancy, will be imported into the terms of the statutory tenancy. The fact that it was inconvenient or unprofitable on the landlord to fulfil his obligation is immaterial. Again if their is covenant in the lease that the

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1. (1949) M.L.J. 452 : I.L.R. (1950) Mad. 152. 2. 93 L.J.K.B. 1080 : 131 L.T. 757.

lessee shall keep the premises in good repair this covenant would be imported into the statutory tenancy, since it is not inconsistent with the Act, which by implication preserves the liability of the tenant, if the lease in fact imposes this liability on the lessees."

On a reference to provisions of the Increase of Rent and Mortgage interest (Restrictions) Act, 1920 I am satisfied that this decision does not lend any support to the view taken by Mack, J., Section 2 (5) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 reads thus :—

> " For the purposes of this section, the expression ' repairs ' means any repairs required for the purpose of keeping premises in good and tenantable repair, and any premises in such a state shall be deemed to be in a reasonable state of repair, *and the landlord shall be deemed to be responsible for any repairs for which the tenant is under no express liability.*"

This means that the tenant will be liable to effect only the repairs which he had under taken to do under the express terms of the tenancy agreement and that the landlord shall be responsible for other repairs not provided for in the agreement. The observation of the Court that the obligations undertaken by the tenant or the landlord to effect repairs by virtue of the contract will be imported into the terms of the statutory tenancy is consistent with, and, indeed, is in pursuance of the provisions of the Act themselves, and the Act specifically provides that the landlord shall be responsible for the repairs, when the tenant has not undertaken to do. There is no warrant in this judgment for the proposition that the terms of the tenancy will override the provisions of any Rent Control legislation, even though the latter has specifically provided for matters covered by the terms of the tenancy.

I am inclined to follow the decision of Subba Rao, J. (as he then was) in *Ramasubbayya* v. *District Munsif of Kurnool*[1], wherein he has laid down that the two statutory conditions to enable a tenant to make repairs to a building under section 11 (2) of the Act XXV of 1949 are (1) failure by the landlord to make the necessary repairs to the building after notice by the tenant and (2) permission by the House Rent Controller to the tenant to make repairs after the landlord had committed default. I do not think that this decision was intended to cover a case where the lease itself contained a covenant to repair.

It is not disputed that the tenancy in question between the parties in the present instance falls within the ambit of the Madras Buildings (Lease and Rent Control) Act, 1960, As I have already observed this Act clearly sets out the rights and liabilities of the tenant and the landlord in respect of repairs; and I am therefore of opinion that the rights and duties of the parties relating to repairs must be ascertained only by reference to section 22 read with section 2 (7) of this Act and that it is not open to the parties to fall back upon the terms of the tenancy agreement or upon the provisions of the Transfer of Property Act for that purpose.

It is urged by the respondent-tenant that he had carried out only repairs and not improvements and that he had not reconstructed the entire house; and his contention had been accepted by the learned Subordinate Judge, but I find it difficult to uphold the same. I have already set out the definition of repairs as found under section 2 (7) of Act XVIII of 1960 and the emphasis in the definition is on word " restoration ", and the section clearly points out that repairs do not include additional improvements or alterations except in so far as they are necessary to carry out such restoration. The term " improvements" has not been defined in the Act; and the meaning and import of the term must be gathered from the dictionaries and decisions.

The decision of this Court in *Mohammad Mohideen Rowther* v. *Mohammad Mohideen Rowther*[2], contains a wealth of information on the distinction between " repairs " and " improvements " as culled out from various dictionaries and judgments,

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1. (1951) 2 M.L.J. (S.N.) 53. 2. A.I.R. 1960 Mad. 24.

Webster's New International Dictionary of the English Language defines repair as "an act of repairing, restoration, or state of being restored, to a sound or good state after decay, waste, injury, etc.". In Stroud's Judicial Dictionary, the words "to repair" are shown as meaning "to make good defects, including renewal where necessary, *i.e.*, patching, where patching is reasonably practicable and, where it is not, you must put in a new piece. But "repairs" does not connote a total reconstruction".

The term "improvement" is defined in Webster's New International Dictionary as "a valuable addition, or betterment, as a building, clearing, drain, fence, etc.; on land". In Ballantine Law Dictionary, "improvement" is described "a word that includes everything that enhances the value of premises permanently for general uses, erection of a building, making substantial changes or additions in existing buildings, the laying of necessary side-walks and the digging of wells, are common illustrations; and it is further observed that it would be in violation of the proper construction of the term "repair" to hold that it included an original improvements, or work of a different character from that previously done.

In *Ram Asray* v. *Hiralal*[1], it is stated that where a kuchcha building is demolished and a new pucca building is constructed, the new construction shall be regarded as an improvement.

After a survey of a large number of authorities, Ramaswami, J., has laid down in *Muhammhd Mohideen Rowther* v. *Mohammad Mohideen Rowther*[2], cited above that all repairs are improvements though all improvements are not repairs.

In *Hansarj Tirathram* v. *The Administrator, Municipality Jammu*[3], the distinction is brought out thus:

> "The expression 'repair' signifies restoration to the original condition. Anything which substantially improves or materially alters a thing from its original condition cannot be said to be merely a repair of that thing; it will be bringing into existence an improved things; an altered thing; a new thing for all intents and purposes. But it cannot be forgotten that "repair" involves an element of renewal yet renewal of the whole or substantially the whole and not a lesser part of the whole cannot be said to be "repair".

In *Lurcott* v. *Wakely and Wheeler*[4], at page 912 Cozens-Hardy, M.R. had observed that "in many cases repair necessarily involves, not repair strictly so called, but renewal. If an earthenware pipe breaks, you can only repair it by renewing it. Or gain, if window becomes rotten and decayed, you cannot repair them except by renewing".

It is thus seem that, in defining the word "repairs" in section 2 (7) of Act XVIII of 1960 the Madras Legislature has substantially adopted the meaning attributed to it by the dictionaries and decisions referred to above. The basic idea underlying the concept of repairs is restoration of a building to its original condition. This implies that the old structure is retained and is renovated from the damaged condition to its original sound state. Repair always involves an element of renewal, but renewal of the whole and substantially the whole cannot be termed repair proper. Where the building is completely demolished and a new structure put instead, it would normally be reconstruction, not repairs proper. In exceptional cases however as those enumerated by Cozens Hardy M.R. in *Lurcott* v. *Wakely and Wheller*[4], however, repair may imply a complete renewal and substitution. In addition material alteration or anything which substantially improves a thing in value from the original condition except in so far as it is necessary to carry out such restoration cannot be said to be merely repair of that things, it will be bringing into existence an altered thing, an improved thing, a new thing for all intents and purposes.

Applying these principles to the present instance, I am satisfied that what the respondent had done to the building would amount to a reconstruction and not

1. A.I.R. 1949 All. 681.
2. A.I.R. 1960 Mad. 24.
3. A.I.R. 1963 J. & K. 18.
4. (1911) 1 K.B. 905.

mere repair as contemplated by Act XVIII of 1960. The original building in question consisted of only the roof, walls and the floor and as a result of the respondents action the entire roof had been replaced, all the walls had been put up afresh and the flooring had been completely done up a new. The whole building had therefore been substantially renovated and it would therefore be idle to contend that only a repair of the building had been done. Even if the work done is taken piece by piece, the renewal of the thatch alone may amount to repair ; and it would be impossible to say that the conversion of the mud walls into brick walls and the mud floor into cement floor would be mere repair. It would clearly constitute a material alteration and an improvement in that the nature and composition of the flooring and the walls had undergone a complete change and the value had considerably enhanced.

It is also clear, that even if the respondents acts can be assumed for the sake of argument only to be repairs, as the respondent had resorted to them without obtaining the previous consent of the Rent Controller on an application, he would not be entitled to any compensation, even to the extent of a month's rent, for the trouble he had undergone in renovating the building.

I would also like to add that, even if the respondent is entitled to invoke section 108 of the Transfer of Property Act, there is no basis whatsoever for his present claim. In the first place, as I have already observed, a landlord is under no obligation in law to effect any repairs to the building except those which he had specifically undertaken under the tenancy agreement; and admittedly it is not the respondent's case that there is any term in the tenancy agreement casting an obligation on the petitioner to effect any repairs to the building. The respondent cannot therefore call upon the petitioner to pay compensation for the repairs he claims to have effected. In the second place, section 108 of the Transfer of Property Act does not confer any right on a tenant to effect a reconstruction of or improvements to the building and claim compensation. I am clear that he had effected a reconstruction of the house.

I am also clear that the provisions of section 70 of the Indian Contract Act cannot be legitimately invoked in this case. In the first place, it is difficult to say that the act of renovation done by the respondent was lawfully done for the petitioner. As observed in *Chedi Lal* v. *Bhagwan Das*[1], by the use of the word "lawfully" in section 70 of the Indian Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify the inference that, by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. In *Panchkore* v. *Hari Das*[2], it was held that it must be considered in each individual case whether the person who made the payment had any lawful interest in making it, if not, the payment cannot be said to have been made lawfully. In the second place, the section is not attracted in cases of services rendered by the claimant at the request of or against the will of the other party sought to be charged with. In order to merit compensation, the services rendered must have been acquiesced in by the other party. The provisions of this section cannot justify the officious obligations in respect of services which the person sought to be charged with did not wish to have rendered. Indeed, evidence in this case is that the petitioner objected to the renovation and went to the extent of physically obstructing when the respondent started the construction and that the respondent carried out the work with the help of the police.

In the result, the revision petition is allowed ; but, under the circumstances, without costs. The judgment and decree of the District Munsif of Melur in O.S. No. 222 of 1966 are confirmed, the decree and judgment of the Subordinate Judge set aside the suit is dismissed with costs.

V.S. ——— *Petition allowed.*

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1. (1889) I.L.R. 11 All. 234 at 243.
2. (1917) 21 C.W.N. 394 at 399.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M.M. ISMAIL.

The Coimbatore Municipal Council, represented by its Chairman, C.P. Nanjappa, Coimbatore, and another .. *Petitioners**

v.

The State of Tamilnadu, represented by the Secretary to Government, Rural Development, and Local Administration Department, Madras-9 .. *Respondent.*

Madras District Municipalities Act (V of 1920), proviso to section 8 (2) and section 9 (1)—Interpretation—Main sub-section (section 8 (2)) dealing with the holding of ordinary elections to fill ordinary vacancies—Operation of proviso to section 8 (2), if confined to stray vacancies—Corporate personality—Municipal Council, a corporate body but different from Municipal councillors who constitute it—Body corporate will continue to be in existence despite vacancy in the entire vacancy of the councillors.

Madras Municipal Authorities (Term of office and Election of Councillors) Act (XXII of 1963) as amended by the Madras Act XI of 1968), Proviso to section 3 (c)—Interpretation—Term of office of the Councillors—Government could extend or reduce the term by notification—Provision if an enabling one.

The principal question for determination is, whether there is an obligation on the State Government to hold ordinary elections to the Coimbatore Municipal Council before the expiry of the term of office of the present councillors.

The proviso to section 8 (2), Madras District Municipalities Act, 1920, has to be read in the context or the main sub-section. The main sub-section deals with the holding of ordinary elections to fill ordinary vacancies in the office of councillors as a whole with regard to municipal councils, and if that is so, there is no reason to confine the operation of the proviso not to such vacancies, but only to stray vacancies. The real point to be noted is that the municipal council as a body corporate is different from the municipal councillors who constitute such a body corporate. Even if the entire office of the councillors is vacant, still the body corporate will continue to be in existene till the existence of the body corporate is brought to an end by any special provision made in the Act itself. It is difficult to accept the argument based upon the submission that if elections are to be held after the occurrence of vacancies to the entirety of the office of the councillors, there will be a hiatus in the corporate existence of the council, but such hiatus is not contemplated by the Act itself. Section 9 (1) of the Act deals not only with ordinary election but also deals with causal election. At the same time, the section refers to the case where "no councillor is elected" at an ordinary or casual election. The coupling of casual election with an ordinary election in section 9 (1) is a clear indication that its scope cannot be the same as the scope of proviso to section 8 (2). Consequently, it is difficult to accept the contention that proviso to section 8 (2) covers only the cases of stray vacancies by applying the language of section 9 (1) of the Act.

Therefore it has to be held that the proviso to section 8 (2) will cover the case of ordinary elections to fill up vacancies in the office of councillors as a whole with regard to any municipality as well and therefore because of this proviso, it is not correct to contend that the statute has imposed an obligation on the Government to conduct the elections within three months before the occurrence of the vacancies but on the other hand, the proviso enables the Government, or sufficient cause, to direct or permit the holding of the ordinary elections after the occurrence of the vacnacies. In view of this enabling provision contained in

*W.P. No. 1127 of 1969. 18th April, 1969.

proviso to section 8 (2), it is difficult to accept the argument that the Government is under an obligation to hold the elections to the municipal council of Coimbatore before the occurrence of the vacancies and that obligation can be enforced by the issue of a writ of *mandamus.*

Held also that, as far as the extension of the period of the councillors upto 1st November, 1969, is concerned, certainly the language of the proviso to section 3 (*c*) of the Madras Act XXII of 1963 which has been amended by the Madras Act XI of 1968, merely states that the Government may from time to time by notification, for sufficient cause direct that the term of office of such councillors as a whole be extended or reduced by such period as may be specified in the notification, but such period or periods shall not in the aggregate, exceed two years. From the very language of the section, this statutory provision is an enabling one and it does not impose an obligation on the Government to extend or reduce the term of the councillors as a whole. Consequently, there cannot be a prayer for the issue of a writ of *mandamus* to extend the term of the present councillors upto 1st November, 1969, solely on the basis of the provisions contained in the proviso to section 3 (*c*) of the Madras Act XXII of 1963, as amended by Act XI of 1968.

If, during the pendency of the writ petition No. 4565 of 1968, elections are held on the basis of the old division of the wards and ultimately the writ petition is dismissed, the entire election and the expenses incurred therewith would have been a complete waste. Consequently, if the Government thought that for the purpose of holding the elections it was desirable to wait the final determination of the validity of the fresh division of wards by this Court, it is not possible to say that the Government are not entitled to do so.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the State of Tamilnadu, the respondent herein, to extend the term of office of the Coimbatore Municipal Council, the first petitioner herein, upto 1st November, 1969 and to hold elections to the said Municipal Council before the expiry of its term of office.

K.K. Venugopal, for Petitioners.

The Court made the following

ORDER.—According to the averments in the affidavit filed in support of this writ petition, the Muncipal Council, Coimbatore consists of 36 councillors elected from 30 wards and the last of the elections was held in February, 1964. Under section 8 (1) of the Madras District Municipalities Act, 1920 as it stood then,

"The term of office of councillors shall, save as otherwise expressly provided in this Act, be three years beginning and expiring at noon on the first day of November."

However, the Madras Legislature passed the Madras Municipal Authorities (Term of Office and Election of Councillors) Act, 1963 (Madras Act XXII of 1963). Under section 3 (*c*) of that Act, it was provided:

"Notwithstanding anything contained in the Corporation Act, the Municipalities Act or the Extension of Term of Office Act, the term of office of the councillors newly elected under clause (*b*) shall expire at noon on the first day of November immediately succeeding the expiry of three years from the date on which such councillors come into office;

Provided that the Government may, from time to time, by notification, for sufficient cause, direct that the term of office of such councillors as a whole be extended or reduced by such period as may be specified in the notification but such period or periods shall not, in the aggregate, exceed one year."

In view of this statutory provision, the term of office of the councillors elected in February, 1964 was to expire on 1st November, 1967. Meanwhile, Madras Act XI of 1968, namely, the Madras Municipal Authorities (Term of Office and Elec-

tion of Councillors) Amendment Act, 1968, amended the proviso to section 3 (*c*) of the Madras Act XXII of 1963 by substituting the words 'two years' for 'one year.' By virtue of this amendment, the term of the councillors was extended to 28th February, 1969. Subsequently it has been further extended to 28th April, 1969. In the meantime the Government for the purpose of conducting fresh elections to the Municipality re-divided the wards. The Municipal Council filed Writ Petition No. 4565 of 1968 on the file of this Court questioning such re-division. The said Writ Petition was admitted on 3rd December, 1968, and this Court granted interim stay of the notification dated 14th December, 1967, wherein the re-division of the wards had been effected. According to the affidavit, on 21st January, 1969, the State Government issued a memorandum directing the holding of elections to all municipal councils in the State except eight municipalities named in the said memorandum in respect of which writ petitions have been filed relating to the re-division of wards, where such writ petitions were either pending disposal or had already been disposed of; one such municipality was the Coimbatore Municipality; the concluding Part of the memorandum stated that in respect of the aforesaid eight municipalities, Special Officers would take over and represent the municipal councils; on 22nd January, 1969, G.O.Ms. No. 108 was issued by the State Government approving a programme of elections to be held to all the municipal councils in the State in the last week of February, 1969, except in the case of the said eight municipal councils; and on 30th January, 1969, the State Government purporting to exercise power under section 8 (4-A) of the Act, (which is:

> "Notwithstanding anything contained in this Act, the State Government may, for sufficient cause, direct from time to time the postponement or alteration of the date of an ordinary or casual election or any stage of any such election."...)"

directed that the elections which should have been held to the municipal councils in the last week of February, 1969, would stand postponed *sine die*. It was in view of this postponement, the term of the municipal councillors was extended to 28th April, 1969. On 4th March, 1969, the State Government issued G.O.Ms. No. 385 directing that elections would be held in the last week of April, 1969, except in the case of ten municipalities including the Coimbatore municipality, which municipal councils have in the meanwhile filed writ petitions challenging the re-division of wards in the case of the respective municipalities and the said Government order stated that the question of holding elections to the said ten municipal councils would be considered later.

The affidavit further states that the petitioners herein were awaiting further orders, in pursuance of the statement made by the Government in G.O.Ms. No. 385 dated 4th March, 1969, that the question of holding elections to the ten municipalities would be considered later; in the first week of April, 1969, the Chairman of the Coimbatore Municipal Council met the then Secretary to the Government in the Local Administration Department, Thiru A. S. Balakrishnan and requested him to inform him about the position of the Government in respect of holding elections to the ten municipal councils including the Coimbatore Municipal Council; he however, informed that no decision had been taken in the matter as yet; on 15th April, 1969, the chairman met Thiru E. C. P. Prabhakar, Secretary to Government in the said Department and again asked him for clarification about the position relating to the 1st petitioner municipal council and nine other municipal councils which were similarly placed; Thiru Prabhakar informed the Chairman that no elections would be held to these ten municipal councils before the expiry of the term on 28th April, 1969, nor would the terms of office of these councils be extended since Special Officers would be taking over these municipal councils on and from the noon of 28th April, 1969; and the petitioners have not received any written orders upto this date.

It is under these circumstances, the petitioners, the 1st petitioner being the Coimbatore Municipal Council represented by Chairman and the 2nd petitioner being the Chairman himself, have filed this writ petition praying for the issue of a writ of *mandamus* or any other appropriate writ, order or direction, directing the State

of Tamil Nadu, the respondent herein, to extend the term of the office of the Coimbatore Municipal Council, the 1st petitioner herein upto 1st November, 1969, and to hold elections to the said Municipal Council before the expiry of its term of office.

Before proceeding to deal with the contentions of the learned Counsel for the petitioners, I must refer to one or two other statutory provisions on which reliance has been placed. Section 368 of the District Municipalities Act provides for the appointment of a Special Officer in relation to a newly constituted and reconstituted municipal councils. Sub-sections (1) to (5) deal with the cases of new constituted municipalities and sub-section (6) thereof applies the provisions of sub-sections (1) to (5) to all cases of reconstitution of municipal councils. The Madras Act X of 1968, namely, the Madras City Municipal Corporation and District Municipalities (Amendment) Act, 1968, amended sub-section (5) of section 368 as well as sub-section (6) of section 368. It is the amendment of sub-section (6) of section 368 which is relevant for the purpose of this writ petition and by that amendment the following expression was added at the and of sub-section (6)

"and to all cases where ordinary vacancies in the office of councillors have not been filled."

The result of this amendment is that the provisions of sub-sections (1) to (5) dealing with the appointment of a Special Officer in respect of the newly constituted municipal councils will apply to old municipal councils also where ordinary vacancies in the office of councillors have not been filled.

Another provision to which attention must be drawn is section 8 of the District Municipalities Act. Sub-section (1) of that section has already been extracted. Sub-section (2) of that section is:

"Ordinary vacancies in the office of councillors shall be filled at ordinary elections which shall, subject to the approval of the State Government be fixed by the election authority to take place on such days within three months before the occurrence of the vacancies as he thinks fit:

Provided that the State Government may, for sufficient cause, direct or permit the holding of any ordinary election after the occurrence of the vacancy".

The prayer in the present writ petition is essentially based upon section 8 (2) of the Act. According to Mr. K. K. Venugopal, learned Counsel for the petitioners, section 8 (2) of the Act imposes an obligation on the authorities concerned to hold ordinary elections for the office of the councillors of a municipality within three months before the occurrence of the vacancies and the object of such a provision is not to allow for a *hiatus* or vacuum in the office of the councillors and therefore before the expiry of the term of the present councillors the authorities must hold the election. As the present term of the councillors is to expire on 28th April, 1969, and from the very nature of the case the elections cannot be held before that date, the further prayer of the petitioners is that the authorities should extend the term of the office of the present councillors upto 1st November, 1969, and hold the elections under section 8 (2) within three months before the occurrence of the vacancies, namely, three months before 1st November, 1969. This petition for the issue of a writ of *mandamus* for the purpose of a direction to the authorities to hold the elections and to extend the term of office of the present councillors can lie only, if the petitioners can satisfy the Court that there is statutory obligation imposed on the authorities concerned to hold the election and there is no scope in the statute itself for escaping from that obligation. As far as the extension of the period of the councillors upto 1st November, 1969, is concerned, certainly the language of the proviso to section 3 (*c*) of the Madras Act XXII of 1963 which has been amended by the Madras Act XI of 1968, merely states that the Government may from time to time by notification, for sufficient cause direct that the term of office of such councillors as a whole be extended or reduced by such period as may be specified

in the notification, but such period or periods shall not in the aggregate, exceed two years. From the very language of the section, this statutory provision is an enabling one and it does not impose an obligation on the Government to extend or reduce the term of the councillors as a whole. Consequently, there cannot be a prayer for the issue of a writ of *mandamus* to extend the term of the present councillors upto 1st November, 1969, solely on the basis of the provisions contained in the proviso to section 3 (*c*) of the Madras Act XXII of 1963, as amended by Act XI of 1968. Further, this prayer is coupled with the prayer for holding the elections, because of the argument of the learned Counsel for the petitioner that section 8 (2) of the Act contemplates that elections should be held within three months from the date of the expiry of the term of the councillors. Consequently, the principal question for determination is, is there an obligation on the State Government, which has been impleaded as the respondent, to hold ordinary elections to the Coimbatore Municipal Council before the expiry of the term of office of the present councillors. It is only with reference to this point, the learned Counsel for the petitioners contended that proviso to section 8 (2) which I have already extracted does not cover a case of this nature and therefore the main Part of section 8 (2) will impose an obligation on the Government to hold the elections. The learned Counsel contended that proviso to section 8 (2) does not apply to the holding of ordinary elections for the entirety of the councillors of the Municipality and it applies only to the holding of stray elections to fill up stray vacancies. In support of this contention, the learned Counsel put forward three grounds. The first ground is that while section 8 (2) uses the expression 'ordinary vacancies,' the proviso uses the word 'vacancy', that is, while the main sub-section uses the plural, the proviso uses the singular. The second submission is that if the proviso is held to apply and cover the case of holding ordinary elections for the office of all the councillors of a municipality, there will be a *hiatus* between the coming to the end of the term of the previous councillors and the commencement of the term of the subsequent councillors to be elected and such a *hiatus* was not contemplated and provided for in the Act itself. The learned Counsel put forward the third ground relying upon the language of section 9 (1) of the Act which is ;

> "If at an ordinary or casual election held under section 8, no councillor is elected, a fresh election shall be held on such day as the Election Authority may fix."

In my view, none of these grounds is tenable. As far as the first ground is concerned, the proviso has to be read in the context of the main sub-section. The main sub-section deals with the holding of ordinary elections to fill ordinary vacancies in the office of councillors as a whole with regard to municipal councils, and if that is so, there is no reason to confine the operation of the proviso not to such vacancies, but only to stray vacancies. The learned Counsel for the petitioners conceded that generally a singular will include plural, but in this context that general presumption cannot be given effect to. I am unable to accept this argument as well. The proviso has been so worded in order to cover all cases that may fall under the main part of section 8 (2). It may be with regard to ordinary vacancies occurring in the office of the councillors as a whole or it may be even with regard to such ordinary vacancies in relation to particular councillors, a direction or permission may be given by the State Government. As a matter of fact, the argument based upon the use of singular is itself not consistent with the argument that the proviso will cover the case of stray "vacancies."

The second ground also is equally untenable. It is based purely on the assumption that the councillors constitute the body corporate and therefore once the term of the councillors comes to an end, the body corporate also comes to an end. Such coming to an end of the body corporate is not contemplated by the Act. Section 5 (1) of the Act states that the municipal authorities charged with carrying out the provisions of this Act are—(*a*) a Council; (*b*) a Chairman; and (*c*) an Executive Authority. Sub-section (2) of that section states ;

"The Municipal Council shall, by the name of the Municipality be a body corporate, shall have perpetual succession and a common seal and subject to any restriction or qualification imposed by this or any other enactment shall be vested with the capacity of suing or being sued in its corporate name, of acquiring, holding and transferring property movable or immovable, of entering into contracts and of doing all things necessary for the purpose of its constitution."

However, the real point to be noted is that the Municipal Council as a body corporate is different from the municipal councillors who constitute such a body corporate. Even if the entire office of the councillors is vacant, still the body corporate will continue to be in existence till the existence of the body corporate is brought to an end by any special provision made in the Act itself. Therefore, I am unable to accept the argument of the learned Counsel for the petitioners based upon the submission that if elections are to be held after the occurrence of vacancies to the entirety of the office of the councillors, there will be a *hiatus* in the corporate existence of the council, but such *hiatus* is not contemplated by the Act itself.

With regard to the third ground mentioned by the learned Counsel relying on section 9 (1) of the Act, I am of the view that proviso to section 8 (2) cannot be interpreted or considered in terms of section 9 (1) of the Act. Section 9 (1) of the Act deals not only with ordinary election but also deals with casual election. At the same time, the section refers to the case, where 'no councillor is elected' at an ordinary or casual election. The coupling of casual election with an ordinary election in section 9 (1) is a clear indication that its scope cannot be the same as the scope of proviso to section 8 (2). Consequently, I am unable to accept the contention of the learned Counsel that proviso to section 8 (2) covers only the cases of stray vacancies by applying the language of section 9 (1) of the Act.

For these reasons I am of the view that the proviso to section 8 (2) will cover the case of ordinary elections to fill up vacancies in the office of councillors as a whole with regard to any municipality as well and therefore because of this proviso, it is not correct to contend that the statute has imposed an obligation on the Government to conduct the elections within three months before the occurrence of the vacancies but on the other hand, the proviso enables the Government, for sufficient cause, to direct or permit the holding of the ordinary elections after the occurrence of the vacancies. In view of this enabling provision contained in proviso to section 8 (2), I am unable to accept the argument of the learned Counsel for the petitioners that the Government is under an obligation to hold the elections to the Municipal Council of Coimbatore before the occurrence of the vacancies and that obligation can be enforced by the issue of a writ of *mandamus*. As I pointed out already the prayer for extending the term of the present councillors upto 1st November, 1969, under proviso to section 3 (*c*) of the Madras Act XXII of 1963, as amended by Madras Act XI of 1968 was coupled with and was made to depend upon the proviso to section 8 (2). Since I have already held that proviso to section 8 (2) applies to the occurrence of ordinary vacancies in the office of the councillors as a whole, the petitioners are not entitled to a writ of *mandamus* to direct the State Government to extend the term of the office of the councillors of the Coimbatore Municipal Council upto 1st November, 1969.

Mr. Venugopal further contended that notwithstanding the pendency of the Writ Petition No. 4565 of 1968, the Government should have conducted the elections on the basis of the old division of wards, after obtaining the permission of this Court, that in case the writ petition was dismissed, such elections would not stand. I am unable to appreciate this contention. If, during the pendency of the Writ Petition No. 4565 of 1968, elections are held on the basis of the old division of the wards and ultimately the writ petition is dismissed, the entire election and the expenses incurred therewith would have been a complete waste. Consequently, if the Government thought that for the purpose of holding the elections it was desirable to wait the final determination of the validity of the fresh division of wards by this Court, I cannot say that the Government are not entitled to do so; nor can I say that it will not constitute sufficient cause for holding the elections, after the disposal of the writ

petition, with reference to the power contained in the proviso to section 8 (2) of the Act.

Mr. Venugopal, learned Counsel for the petitioners, then questioned the validity of the amendment of section 368 (6) of the Madras District Municipalities Act, 1920 effected by Madras Act X of 1968. The argument is that the Government is given arbitrary power to pick and choose; namely, with reference to which municipalities it will appoint a Special Officer and with reference to which municipalities it will extend the term of the councillors. As far as the present writ petition is concerned, in my opinion, that question does not really arise. This argument is based solely on the averment contained in the affidavit that when the Chairman of the Coimbatore Municipal Coucil met the Secretary to the Department concerned on 15th April, 1969, that officer told him that no elections would be held to the ten Municipal Councils before the expiry of the term on 28th April, 1969; nor would the term of office of these Councils be extended since Special Officers would be taking over these Municipal Councils on and from the noon of 28th April, 1969. I am unable to accept this oral statement of the Secretary to the Department made to the Chairman of the Municipal Council as constituting the decision or order or notification of the State of Tamil Nadu. If and when the State of Tamil Nadu takes action in a proper manner and according to the procedure known to law, there will be time enough for the petitioners to question such action. Therefore, it is not necessary for me in this writ petition to consider the argument of the learned Counsel for the petitioners regarding the validity of the amendment effected by Madras Act X of 1968, to section 368 (6) of the Madras District Municipalities Act, 1920, as yet, there has been no decision of the Government brought to my notice as to whether they have decided to extend the term of the office of the present councillors or to appoint Special Officers. Whether the Government will extend the term of the present councillors or appoint Special Officers is a thing which has to be decided by the Government with regard to the facts and circumstances of each case.

Though I am dismissing this writ petition on the ground that the petitioners herein are not entitled to the issue of a writ of *mandamus*, still I wish to make it clear that I am not holding that the Government need not extend the term of the office of the present councillors and as I said already this is an enabling power which it is open to the Government to exercise at any time, for sufficient cause.

Under these circumstances, this writ petition fails on the sole ground that the petitioners are not entitled to the issue of a writ of *mandamus* to compel the Government to extend the term of the office of the councillors of the Municipal Council upto 1st November, 1969, and to hold the elections to the said Municipal Council before the expiry of its term of office, and accordingly it is dismissed.

Since I am dismissing the writ petition on merits, it is unnecessary to consider whether the 1st petitioner has been properly represented and validly authorised to institute this writ petition along with the second petitioner, since the learned Counsel for the petitioner admitted that there has been no resolution of the Municipal Council for the purpose of filing the present writ petition.

V.M.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM AND MR. JUSTICE K. N. MUDALIYAR.

Chonachalam Pillai and others .. *Appellants**

v.

Sankaranarayana Pillai (died) and others .. *Respondents.*

Religious Endowments—Temple—Public or private—No presumption that it is public or private — Question depends on the inference to be drawn from the relevant facts and circumstances.

Civil Procedure Code (V of 1908), *section* 92—*Public Temple—Non-compliance of section* 92—*Whether disentitles plaintiff to get reliefs not covered under section* 92 (obiter).

There is no presumption that the suit temple is a public or a private temple. It is true that the circumstances that besides the idol of Marthanda Vinayakar there are idols of Siva and Sivakami, that the idols are stone idols fixed to the earth, that there is a poojari for the temple, that the temple is located in a different place from the residence of the parties and that the public worship in the temple are relevant in deciding the question whether the suit temple is a public temple. But they have to be taken into consideration along with the other facts and circumstances of the case. The above circumstances cannot make the temple a public temple unless the founder intended the public to be the beneficiaries and wanted the temple to be a public temple. The ordinary Hindu sentiment is not to prohibit any worshipper from worshipping in a temple even though a temple were founded mainly for the worship of the members of the family of the founder. The decision on the question whether the suit temple is a public temple or a private temple really depends on the inference to be drawn from the relevant facts and circumstances referred to above. On facts *held,* the suit temple is a private temple of the family of the founder.

Obiter. Held, if the suit trust is in respect of a public temple as contended by the appellants, section 92, Civil Procedure Code, cannot apply in view of section 92 (2), Civil Procedure Code. Some of the reliefs claimed in this suit, namely, the removal of the appellants from trusteeship and framing a scheme will clearly fall under section 64 of the Madras Hindu Religious and Charitable Endowments Act XXII of 1959. The contention of the respondents, that, even if the case of the appellant that the suit temple is a public temple is accepted, the entire suit should not be dismissed and that the decree and judgment of the lower Court should be confined in so far as it directed the alienees to deliver possession of the suit properties to the plaintiff who was entitled to manage the suit temple, was accepted.

Appeal against the decree of the Court of the Subordinate Judge, Nagercoil, dated 18th February, 1963 in Original Suit No. 20 of 1961.

R. Ramamurthi Iyer and *T.S. Srinivasan,* for Appellants.

S. Padmanathan, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J.—Appellants are defendants 1 to 3 in O.S.No. 20 of 1961, on the file of the Subordinate Judge's Court, Nagercoil, and their appeal is against the decree and judgment in the suit allowing the claim of the first respondent-plaintiff ordering their removal from the management of the suit trust, directing them to account for the trust funds in respect of their half share and ordering a scheme to be framed for the suit trust. The first respondent-plaintiff Sankaranarayana Pillai died during the pendency of the appeal and his legal representatives have been added as parties.

Sankaranarayana Pillai filed the suit in the lower Court on the basis that the suit properties belonged to a private family trust and they were endowed in the

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* Appeal No. 510 of 1963. 1st August, 1969.

name of the family idol called Chona Mariyadumperumal Marthanda Vinayakar by one Chona Mariyadumperumal who was the original ancestor of the family in which the plaintiff and defendants 1 to 3 are members. The other defendants are the alienees from defendants 1 to 3. The case of the appellants in the lower Court was that the suit properties were family properties and that they merely stood in the name of Chona Mariyadumperumal *benami* for the family. According to them, the properties were not dedicated to Chona Mariyadumperumal Marthanda Vinayakar or the temple. The learned Subordinate Judge has found on a consideration of the entire evidence in the case that the suit properties are the private family trust properties and that the plaintiff and the first defendant were each entitled to joint rights in the management of the same.

Sri R. Ramamurti Iyer, appearing for the appellants, made no attempt to support the claim of the appellants put forward in the lower Court that the suit properties are the family properties of the appellants. There is no doucment to evidence the dedication of the suit properties in favour of Mariyadumperumal Marthanda Vinayakar. But the pattas for the suit properties are in favour of the deity. In fact, the appellants have dealt with the suit properties as belonging to Marthanda Vinayakar. There is now no dispute either about the fact that the suit properties were endowed by Chona Mariyadumperumal, the ancestor of the appellants and the deceased plaintiff or the fact that it is the appellants and the deceased plaintiff who were in joint management of the suit properties as trust properties.

The only contention urged by Sri R. Ramamurthi Iyer on behalf of the appellants is that the suit temple is a public temple and that the suit trust is therefore a public trust. He relied on the plea raised in paragraph 22 of the written statement of the first defendant which reads as follows :—

> "The trust alleged if any is having the characteristic of a public trust as they relate to a temple in a public place where all Hindus have the right to worship. The suit is also not maintainable and is barred by section 92 of the Civil Procedure Code and the provisions of the Hindu Religious Endowments Act."

He commented on the fact that the learned Subordinate Judge has dealt with this plea in a summary manner in dealing with issue 14 in paragraph 30 of his judgment. But as rightly urged by the learned Advocate for the contesting respondents, there was no plea in the lower Court that the suit temple is a public temple and the contest in the lower Court was only about the claim of the appellants that the suit properties belonged to their family as against the claim of the first respondent-plaintiff that the suit properties were private family trust properties.

In paragraph 3 of the plaint it is clearly alleged that the plaint properties belong to a private family trust and that they were endowed in the name of the family idol called Chona Mariyadumperumal Marthanda Vinayakar. There is no plea in the written statements of any of the defendants that the suit temple is a public temple. We have already referred to the plea of the first defendant in his written statement that though the properties stand in the name of Marthanda Vinayakar, the idol was only a benamidar for his family. In paragraph 5 of his written statement, the first defendant has stated that as for wrorship any Hindu is entitled to worship in the temple. We have already referred to the averments in paragraph 22 of the written statement of the first defendant that the trust is having the characteristic of a public trust as it relates to a temple in a public place wher all Hindus have a right to worship. Defendants 5 and 6 have pleaded in their written statement that Chona Mariyadumperumal Marthanda Vinayakar is the family deity of the family of defendants 1 to 3. Defendants 7, 10, 13 and 30 have pleaded in paragraph 5 of their written statement that all the Hindus are entitled to worship in the temple. Thus there is no specific plea in the written statements that the suit temple is a public temple and no issue has been framed, whether the suit temple is a public temple, as no such plea was raised by any of the defendants. It is only in the grounds of

appeal the appellants have come forward with the case that the suit temple is a public temple and Sri R. Ramamurthi Iyer argued only that question.

We have to mention at the outset that there is no presumption that the suit temple is a public or a private temple. In *V.K. Kelu* v. *C.S. Sivarama Pattar*[1], it has been held that there is no presumption of law or fact that a temple in Malabar is either public or private and that it will depend on the facts proved in each case. This decision was approved by the Privy Council in *Mundancheri* v. *Achuthan*[2]. It has been held in the Privy Council decision that in the greater part of the Madras Presidency where private temples are practically unknown, the presumption is that temples and their endowments form public charitable trusts, but that no such presumption exists in case of temples situated in Malabar. This decision was followed by a Bench of this Court in Appeal No. 385 of 1957.

In the Bench decision in Appeal No. 385 of 1957, it has been pointed out that no useful purpose would be served in reviewing all the authorities because when we can deduce the working principle, the application of that principle would certainly vary with the facts of each case and it is the facts of the particular case where should decide whether the particular temple involved in that litigation is a public temple or not. On a consideration of the "numerous circumstances" pointed in that decision, it was held that the temple in that litigation was a public temple. Sri R. Ramamurti Iyer referred to some of the circumstances existing in this case, which are also found in that judgment, and argued that the suit temple is a public temple. Thus he referred to the facts, that the plaintiff has his own private temple in his own place Kulasekarapuram, that the suit temple is in a different place Myladi ,which is a mile from his place, and is not located in the family house, that there is a poojari P.W.2 Venkitachalam Iyer for the suit temple, that besides Vinayakar there are also idols of Siva and Sivakami, that the idols are stone idols fixed to the earth and that the public worship in the temple. Though no one has spoken to the fact that stone idols are fixed to the earth, it is clear from the evidence of the plaintiff and the priest P.W. 6, that Ashatabandanam ceremony was done in the temple for fixing the idols which had become shaky. It is true the above circumstances are relevant in deciding the question whether the suit temple is a public temple. But they have to be taken into consideration along with the other facts and circumstances of the case.

We have already referred to the fact that there were numerous circumstances in the Bench decision in Appeal No. 385 of 1957 to show that the temple in that case was a public temple, as evident from the following passage:

> "The facts established are (1) The suit temple is situate outside the dwelling house of the members of the tarwad: in this case at a distance of 2 furlongs from the tarward house. (2) The presiding deity is a stone idol fixed to the ground. (3) Other copper idols including Utsava Moorthies are kept in the temple. (4) A regular hierarchy of temple servants has been provided for both for purpose of the worship and other ancillary services to be performed in the temple. (5) From time immemorial the general Hindu public of the village have been worshipping the deity in this temple. (6) Offerings are made by such worshippers in the shape of *Vazhipadus*. (7) Utsavams are conducted in the temple and deities are taken out in procession during such celebrations and worshippers offer what is called Thirukancharthu when deities are so taken out. (8) All the properties owned by the deity stand registered in the name of the deity and not in the name of any member of the family. This applies not only to properties registered in the name of the Vinayagar temple in Theroor but also to the two other temples, one at Marayankulam and the other at Tiruchendur. (9) The object of the endowment in this case comprises not only of the wordship of the deities but also feeding of brahmins on Dwadasi and Thiruvathira days and on Thirukarthikai days in the month of Karthikai and the feeding of all Hindus on

1. A.I.R. 1928 Mad. 879. I.L.R. 58 Mad. 91 : A.I.R. 1934 P.C. 230.
2. (1934) 67 M.L.J. 788 : 61 I.A. 405 :

the Thiruvathira day in the month of Markazhi. (10) Two images of village deities, one called Pulimadan and the other called Maruthachi Amman are found embedded in the walls of the temple near the entrance and there is evidence to show that these deities are worshipped by the villagers by celebrating what is called Kodai and the expenses for such celebrations are met by the villagers by subscriptions raised from among themselves. In addition to these circumstances Mr. Ramamurthi Ayyar stressed before us the following points. He said that the temple was founded more than 300 years ago by the side of a public tank in a place which is very convenient to the members of the public for purposes of worship. In addition he also brought to our notice the existence of a stone inscription Exhibit *L* embedded in the wall of the temple giving the history of the foundation of this temple and the *Dhittam* for the purpose of the various services in the temple."

It is relevant at this stage to refer to the Bench decision in *Madras H. R. E. Board* v. *Deivanai Ammal*[1], where Sri Veda Vinayakar Temple at No. 187, China Bazaar Road, Madras, was held to be a private temple in spite of the following broad features on which the Madras Hindu Religious Endowments Board relied.

"(1) that when this temple was built in 1919 kumbhabhishekam was performed on a grand scale; (2) the respondent also made *utsava murties* and built *chaprams*, and the deities were also taken in procession on some special occasions; (3) or a Gurukkal has been engaged to perform the puja regularly; and (4) the temple has got a gopuram and other features which are usually found in a public temple."

In *Deoki Nandan* v. *Murlidhar*[2], the Supreme Court held that a religious endowment must be held to be private or public, according to the beneficiaries thereunder are specific persons or the general public or sections thereof. On a consideration of the will of the founder, the user of the temple by the public, the ceremonies relating to the dedication and other facts relating to the character of the suit temple, it was held in that case that the Thakurdwara of Sri Radhakrishnaji in Bhadesia was a public temple.

We have already referred to the pleadings in this case that there is no specific plea that the suit temple is a public temple. The plaintiff examined himself as P.W. 1 and he has stated that the suit properties are trust properties of Chona Mariyadumperumal Marthanda Vinayakar and the trust is a private family trust founded by his ancestor Sri Chona Mariyadumperumal. It is clear from his evidence that he and the appellants alone managed and spent for the temple. He stated that no idol in the temple was taken in procession. According to him, poojas are offered in the temple. The evidence of the first defendant is that he alone spent for the temple from the income of the suit properties. There is no evidence in this case that anyone other than the appellants and the plaintiff spent for the temple. We have already referred to the fact that there is no document evidencing the dedication of the suit properties to Marthanda Vinayakar. In fact, the claim of the appellants that the suit properties belonged to their family and that Marthanda Vinayakar was only a benamidar belies their contention that the suit temple is a public temple. The suit temple has no other income apart from the income from the suit properties. D.W. 1 Subramania Pillai, the 23rd defendant in the suit, stated in his evidence that the suit temple is a family temple of the first defendant and that the first defendant's family alone has a right over the temple. D.W. 2 Bhagavathiperumal is the 22nd defendant in the suit. He also stated that the suit temple is a temple of the first defendant. D.W. 6 is the son of Arunachalam Pillai shown in the genealogy table in the judgment. He also stated that the plaint temple belongs to the family of the first defendant. He clearly stated that the temple was founded by his ancestors and that nobody had endowed any property to the deity. The facts that besides the idol of Marthanda Vinayakar there are idols

1. (1953) 2 M.L.J. 688 : A.I.R. 1954 Mad. 482.
2. (1957) S.C.J. 75 : (1956) S.C.R. 756 : (1957) 1 An.W.R. (S.C.) 28 : (1957) 1 M.L.J. (S.C.) 28.

of Siva and Sivakami, that the idols are stone idols fixed to the earth, that there is a poojari for the temple and that the temple is located in a different place from the residence of the parties cannot make the temple a public temple unless the founder intended the public to be the beneficiaries and wanted the temple to be a public temple. It is true P.W. 2 admitted in cross-examination that there are crowds daily in the temple. There is also the evidence of the defence witnesses that the public worship at the temple. Thus, D.W. 1 stated that people from Marthandapuram attend the temple. D.W. 2 stated that many people come to the temple. But his evidence is that the suit temple is a private temple. Further the evidence does not show that the public worship at the temple as of right. It is pointed out in the Privy Council decision in *Mundacherri* v. *Achuthan*[1], that

> "Had there been any sufficient reason for holding that these temples and their endowment were originally dedicated for the tarwad, and so were public trusts their Lordships would have been slow to hold that the admission of the public in later times possibly owing to altered conditions would affect the private character of the trusts."

The ordinary Hindu sentiment is not to prohibit any worshipper from worshipping in a temple even though a temple was founded mainly for the wordship of the members of the family of the founder. The decision on the question whether the suit temple is a public temple or a private temple really depends on the inference to be drawn from the relevant facts and circumstances referred to above. On a consideration of the entire evidence in this case, we have no doubt that the suit temple is a private temple of the family of the founder Chona Mariyadumperumal, the original ancestor of the appellants and the plaintiff.

In view of the above finding, it is really unnecessary to consider the question whether the suit is barred under section 92, Civil Procedure Code, or section 108 of the Madras Hindu Religious and Charitable Endowments Act, 1959. If the suit trust is in respect of a public temple as contended by the appellants, section 92, Civil Procedure Code, cannot apply in view of sub-section (2) of that section. In fact section 108 of the Madras Hindu Religious and Charitable Endowments Act, 1959, provides as follows :—

> "No suit or other legal proceedings in respect of the administration or management of a religious institution or any other matter or dispute for determining or deciding which provision is made in this Act shall be instituted in any Court of law, except under, and in conformity with, the provisions of this Act."

Some of the reliefs claimed in this suit, namely, the removal of the appellants from trusteeship and framing a scheme will clearly fall under section 64 of Madras Hindu Religious and Charitable Endowment Act XXII of 1959. The learned Advocate for the contesting respondents relied on the decision in *S. K. Mitra v. H. C. Dey*[2], where it has been held that the fact that some of the reliefs cannot be granted because of the non-compliance of the provisions of section 92 of the Civil Procedure Code cannot disentitle the plaintiff to get other reliefs, which can well be claimed in an ordinary suit. It has been pointed out in that case that the reliefs claimed in the suit and concerned in the lease granted by the trustees in that case are substantial and that the case in respect of the same is clearly distinct and separate from the rest of the reliefs claimed which required sanction under sections 92, Civil Procedure Code. In *Ranchhoddas* v. *Mahalaxmi Vehuji*[3], it was held that a suit for a declaration that the property in suit belongs to a public trust of a religious and charitable character did not fall within the mischief of section 92, Civil Procedure Code. It was pointed out that in substance that was a suit for possession of the trust properties and the claim for possession was made against the alienees and that such a suit was obviously outside the purview of section 92, Civil Procedure Code. In *Bishwanath* v. *Radha Ballabhiji*[4] the Supreme Court has held that a suit filed by an idol for declaration of its title and

1. (1934) 67 M.L.J. 788 : L.R. 61 I.A. 405 : I.L.R. 58 Mad. 91 : A.I.R. 1934 P.C. 230.
2. A.I.R. 1960 Cal. 558.
3. A.I.R. 1953 Bom. 153.
4. (1967) 2 S.C.J. 331 : A.I.R. 1967 S.C. 1044.

possession of property from a person who is in possession thereof under a void alienation, being only in the nature of enforcement of a private right by the idol and not being for any one of the reliefs found in section 92 of the Code of Civil Procedure, falls outside its purview, and is not barred. It has also been held that when such an alienation has been effected by the *shebait,* acting adversely to the interests of the idol, even a worshipper can file the suit, the reason being that the idol is in the position of a minor and when the person representing it leaves it in a lurch, a person interested in the worship of the idol can certainly be clothed with an *ad hoc* power of representation to protect its interest.

In *V. L. N. S. Temple* v. *I. Pattabhiram*[1], the Supeme Court has held that a suit for rendition of accounts by the present trustee against ex-trustee is not barred by section 93 of the Madras Hindu Religious and Charitable Endowments Act, 1951, which corresponds to section 108 of the Madras Act XXIX of 1959.

Relying on the above decisions, the learned Advocate for the contesting respondents urged that, even if the contention of the learned Advocate for the appellants that the suit temple is a public temple is accepted, the entire suit should not be dismissed and that the decree and judgment of the lower Court should be confirmed in so far as it directed the alienees to deliver possession of the suit properties to the plaintiff, who was one of the trustees entitled to manage the suit temple. Though we entirely agree with this contention, it is unnecessary to discuss it in detail in view of our finding that the suit temple is a private temple and that the suit properties are the private family trust properties as pleaded in the plaint.

The decree and judgment of the lower Court and correct and they are confirmed and the appeal is dismissed with the costs of the contesting respondents (L.Rs. of the deceased plaintiff).

S.V.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

V. Narayanan .. *Appellant**

v.

M/s. Madura Company (P.) Ltd. Nagapattinam, represented by its Manager, carrying on business as Shipping Agents having its Registered Office at Chochin .. *Respondent.*

Master and Servant—Employee dismissed from service—Dismissal order set aside under section 41 of the Madras Shops and Establishment Act (XXXVI of 1947)—Employer declining to employ—Later on, repudiation of relationship of Master and Servant by employer—Suit for reinstatement, by employee—Whether entitled to—Rights of employee.

Madras Shops and Establishment Act (XXXVI of 1947), section 41—Setting aside the order of dismissal—Effect of.

Clearly, the plaintiff cannot claim relief by way of reinstatement. The matter is before the civil Court under its ordinary jurisdiction, and the relationship between the parties is contractual. The law governing the matter is the ordinary law of Master and Servant. The special reliefs which can be granted by a Tribunal adjusting industrial relations cannot be availed of before the Civil Court in a regular common law suit. To grant reinstatement would be to specifically enforce a contract of service. The right of an employee whose services is wrongfully terminated is to claim damages.

The effect of the order, under section 41 of the Madras Shops and Establishments Act (XXXVI of 1947), setting aside the order of dismissal, is that the dismissal, is no longer there and the employee must be deemed to continue in service.

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1. A.I.R. 1967 S.C. 781.

* S.A. No. 1389 of 1966. 19th January, 1968.

On facts, *Held*, that the plaintiff was entitled to arrear of salary from the date of termination of his services, by his employer which was set aside under section 41 of the Act, till the date of repudiation of the relationship of Master and Servant and for damages for wrongful dismissal as and from the date of such repudiation.

Appeal against the Decree of the Court of the Subordinate Judge of Nagapattinam in Appeal Suit No. 20 of 1965 preferred against the decree of the Court of the District Munsif of Nagapattinam in Orginal Suit No. 250 of 1963.

R. Desappan and *R. Ganesan*, for Appellant.

King & Partidge for Respondent.

The Court delivered the following

JUDGMENT.—This appeal has been preferred by the plaintiff, from the decision of the learned Subordinate Judge of Nagappatinam, varying the decree granted in his favour by the District Munsif of Nagapattinam. The plaintiff was an employee of the defendant-company and was dismissed from its service on 8th June, 1962. He thereupon preferred an appeal under section 41 of the Madras Shops and Establishments Act XXXVI of 1947, and on 14th November, 1962 the order of dismissal was set aside. On the defendant-company refusing to entertain the plaintiff in service, after issuing notice, the plaintiff instituted the suit out of which this second appeal arises claiming reliefs, *inter alia*, for reinstatement in service, for salary from the date of dismissal till the date of plaint with interest thereon and, in the alternative, damages for wrongful dismissal in a sum of Rs. 2,000. The defendant-company raised various defences, *inter alia* challenging the validity of the order of the Additional Commissioner for workmen's Compensation, the appellate tribunal under section 41 of the Act aforesaid.

It is unnecessary to consider whether the civil Court has not the jurisdiction to go behind the order and whether it is not open to a party affected to challenge the correctness of the order made under section 41 in a civil Court, as on the merits the defendant-company has failed to establish that its order of dismissal was not wrongful. The trial Court which went into the merits of the case finds that it could be safely accepted that the order of dismissal of the plaintiff passed by the defendant-company was wrongful and that there was no proper enquiry before the passing of the order. In that view, the trial Court decreed in favour of the plaintiff the arrears of salary claimed and directed also his reinstatement. On appeal therefrom, the learned Subordinate Judge of Nagapattinam set aside the order or reinstatement, and in my view, quite properly. He held that the plaintiff would, however, be entitled to damages for wrongful dismissal and he granted the plaintiff 9 months salary as damages. It is from this decision that the employee has come up on second appeal.

Clearly, the plaintiff cannot claim relief by way of reinstatement. The matter is before the civil Court under its ordinary jurisdiction, and the relationship between the parties is contractual. The law governing the matter is the ordinary law of master and servant. The special reliefs which can be granted by a Tribunal adjusting Industrial Relations cannot be availed of before the civil Court in a regular common law suit. To grant reinstatement would be to specifically enforce a contract of service. The right of an employee whose services is wrongfully terminated is to claim damages.

But what is the effect of the order under section 41. In *Tata Iron and Steel Co. Ltd.* v. *Ramakrishna Iyer*[1], a Division Bench of this Court observed:

"The employer passes an order dispensing with the services of an employee. That order is carried on appeal to a higher authority. That authority reverses the decision of the employer and the result is that the order of the employer is

1. (1950) 2 Lab.L.J. 1043 (Mad.).

set aside. It is no longer in existence. It follows that the effect of the orginal order of the employer also disappears and it is as if the order is *non est.*":

The dismissal order is no longer there and the employee must be deemed to continue in service. What has happened in this case is, when the employee with the order in his favour required of the defendant to be taken back and given his back wages, the defendant refused to entertain him in its service. The company asserted that they would be agitating the validity of the order passed under section 41 of the Act and that there was no question of their paying any wages to the plaintiff, or taking him back into service. They clearly declined to employ him. In my view, this again, in effect, is a breach of the contract between master and servant. In *Rubel Bronze and Metal Company and Vos, in re*[1], it is stated:

"Dismissal may be effected by conduct as well as words. A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfil his contract of employment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract."

In the instant case there is a clear repudiation of the relationship of master and servant by the reply notice Exhibit A-3 dated 23rd February, 1963 given by the defendant. The learned Subordinate Judge in this case following the decision in *Mohana Krishna Naidu* v. *National Bank of India Ltd*[2], awarded nine months wages as damages. This award of damages is attacked by learned Counsel for the appellant as erroneous on principle. Learned Counsel would state that having regard to the numerous decisions under section 41, at any rate till there was a repudiation by the employer of his obligation to entertain the plaintiff in service on the employee securing an order in his favour under section 41 of the Act, he must be deemed to have been in service and so entitled to salary for the period. The question of damages will arise only on the refusal to take back in service when the employee presented himself. In support of the contention that he is entitled to the salary for the period, learned Counsel referred me to the decision in *Dhandapani* v. *Salem Co-operative wholesale Stores*[3], Following the earlier decision of this Court in *Balasundara Mudaliar* v. *Ellappa Mudaliar*[4], the learned Judge Ramachandra Iyer, J., as he then was, held that the effect of setting aside the order of the employer terminating the service of the employee was that he continued to be in service and that if he continued to be in service he should be paid his salary. The learned Judge remarked.

"It is not the case of the respondent (employer) that they terminated his service by any other order except the impugned one......I am of opinion that the termination in the present case being wrongful the employee must be deemed to have continued in service without a break and that he would be entitled to the salary for which he filed the suit."

The amount claimed in that suit was the salary for the period till he was reentertained by the employer. If this ruling is followed, the plaintiff would be entitled to claim arrears of salary from 8th June, 1962 till 23rd February, 1963 when there was a repudiation of the obligation to entertain the plaintiff in service. The learned Subordinate Judge has ignored that under the law, as it stands, the plaintiff would be entitled as of right to salary till 23rd February, 1963. The plaintiff may claim damages for wrongful dismissal if he is so minded, as and from 23rd February, 1963. Reference in this connection may be made also to the decision in *Subbarami* v. *Nellore District Co-operative Stores*[5]. where it was said:

1. L.R. (1918) 1 K.B. 315 at 323.
2. I.L.R. (1960) Mad. 377 : (1960) 1 M.L.J. 405.
3. (1959) 1 M.L.J. 108.
4. (1957) 1 M.L.J. 7.
5. (1961) 1 An.W.R. 167 : A.I.R. 1961 A.P. 313 at 318.

"His (employee's) services must be treated as having continued till the date when the Co-operative Stores, notwithstanding the order of the Commissioner refused to entertain him in service which they did in the teeth of that order. This action on their part would expose them to criminal prosecution under section 45 of the Madras Shops and Establishments Act, but that is a different matter. At any rate, the salary claimed is for a period upto a date prior to 29th March, 1954, *viz.*, till 7th March, 1954. The employee was left in no doubt that as from 29th March, 1954 he would not be entertained in service."

In that case the employee filed the suit claiming salary from the date of termination of service till 7th March, 1954 with interest at 6 per cent per annum on the salary claimed from the date of plaint.

It is manifest, therefore, that the computation of damages awarded by the learned Subordinate Judge in this case cannot be sustained. The plaintiff will be as of right entitled to salary for a period of eight months and 15 days, that is, till 23rd February, 1963, and damages for wrongful dismissal has to be treated as an independent claim. The refusal to reinstate in this case was after the employee had been able to obtain an order in his favour that the dismissal was wrongful. The defendant has not succeeded in the Courts below in impugning the validity of the order. In the circumstances, learned Counsel for the plaintiff would contend that the damages must be adequate and substantial and that as it is, if what he is entitled to as of right is deducted, he gets as damages only 15 days salary. There is considerable force in this contention. Of course, on the refusal to reentertain, the employee could have prosecuted the employer. That is quite a different matter. Here, he is claiming damages for wrongful dismissal and in the plaint he has, in the alternative to his claim for salary and reinstatement, claimed damages. Having regard to all aspects of the matter, I think rather than send the case back for reassessment of damages, this will be a fit case where the plaintiff should be given a decree for an amount equal to 12 months salary made up of arrears of salary for a period of 8 months and 15 days, that is, from 8th June, 1962 till 23rd February, 1963, and damages at the rate of the salary for a period of 3½ months. Thus, the plaintiff becomes entitled to a sum of Rs. 467.50 as arrears of salary, and a sum of Rs. 192-50 as and for damages for wrongful dismissal. I have fixed the damages having regard to several matters discussed by the Courts below as to the nature and character of the plaintiff's employment. The sum of Rs. 467.50 will carry interest at 6 per cent from the date of plaint till decree in the trial Court and from the date of the decree the entire amount of Rs. 660 will carry interest at 6 per cent till realisation. The decree of the lower appellate Court will be modified accordingly.

As regards costs, the order of the lower appellate Court as to costs in that Court and in the trail Court will stand. In this Court, the plaintiff will be entitled to counsel fee and the defendant besides bearing its own costs, will pay the Court-fee due and payable here to the Government that is, right through, the Court-fee payable will be borne by the defendant.

No leave.

S.V.J. *Appeal partly allowed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

Syed Mohamed Salia Lebbai and others .. *Petitioners**.

v.

Mohamed Hanifa and others .. *Respondents.*

Constitution of India (1950), *Article* 133 (1)—" *Judgment, decree or final order* "—*What amounts to—Scheme suit—Nature of the property in dispute finally determined—Suit remanded for framing scheme—If final decision.*

It is now well settled that in order to enable a party to obtain leave to appeal to the Supreme Court under Article 133 (1) of the Constitution the order sought to be appealed against should amount to a judgment or final decision relating to the rights of the parties. The finality must be a finality in relation to the suit and if after the order by the High Court the proceeding still remains to be tried and the rights in dispute between the parties have to be determined the order will not be a final one within the meaning of Article 133 of the Constitution. But where rights of the parties have been finally determined by the decision from which leave to appeal is sought, and all that remains to be done by the trial Court is an ancillary question, the judgment or order will be a final one.

Thus where in an appeal arising from a suit for settlement of a scheme under section 92 of the Code of Civil Procedure the High Court decides finally the character of the property in dispute, and remits the case back for framing of a scheme, it must be held that the decision is a final one within the meaning of Article 133 (1). The remittal of the matter to the trial Court for settlement of a scheme is only a consequential matter and cannot detract against the finality of the decision as to the nature of the property.

Petitions under Article 133 (1) (*a*) (*b*) and (*c*) of the Constitution of India and section 110, Civil Procedure Code and Order 45, Civil Procedure Code to appeal to the Supreme Court of India against the judgment and decree of the High Court dated 28th October, 1966 in Appl No. 227 of 1960, etc.

R. Gopalaswami Aiyangar, for Petitioners in S.C.P. No. 86 of 1967 and in S.C.P. No. 87 of 1967 and for Respondents in 102 of 1967.

S.K. Ahmed Meeran for *R.G. Rajan,* for Respondents in S.C.P. Nos. 86 and 87 of 1967 and for Petitioners in S.C.P.No. 102 of 1967.

The Judgment of the Court was delivered by

Veeraswami, J.—These are petitions for a certificate under Article 133 (1) of the Constitution. Our judgment reversed the common judgment of the trial Court in two suits and held that the mosque and its adjuncts together with the sites as well as the burial ground constituted a public trust. We accepted the trial Court's finding that there had been mismanagement by the defendants. On the view, we remitted the matters to the trial Court for settlement of a scheme of management pursuant to our directions in that behalf .

The point debated before us at the Bar is whether our judgment is within the scope of " any judgment decree or final order " in Article 133 (1). Both the plaintiffs and the defendants independently ask for leave to appeal to the Supreme Court by different petitions. Nevertheless, the question has been raised. On the one hand the contention is that all the rights of the parties have been determined and that all that remains to be done by the Court below is to carry out the directions of this Court to settle a scheme. The argument on the other hand is that that is not test to decide whether our judgment is one within the meaning of Article 133 (1). It is said that determination of even a vital issue will not make it a judgment if it has the effect of leaving the suit alive. The question in controversy is not a new

* S.C.P. Nos. 86, 87 and 102 of 1967 in App. No. 227 of 1960. 25th January, 1968.

one and has been repeatedly considered and decided in numerous cases. In *Firm Ramanand Manjilal* v. *Firm Govardhandas Visahadas Ratanchand*[1], the Privy Council with reference to similar words which occur in sections 109 and 110, Civil Procedure Code, adopted the principle as stated below in *Abdul Rahiman* v. *D.K. Cassim and Sons*[2]:

> "The finality must be finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it............ The effect of the order from which it is here sought to appeal was not to dispose finally of the rights of parties. It is no doubt decided as important and even a vital issue in the case, but it left the suit alive and provided for its trial in the ordinary way."

This interpretation was applied by the Federal Court in *Mohamed Amin Brothers Ltd.* v. *Dominion of India*[3], for determining the scope of a judgment, decree or final order in section 205 (1) of the Government of India Act 1935, which corresponds to Article 133 (1) of the Constitution. The Supreme Court in *Jethanand and Sons* v. *State of U.P.*[4], pointed out that an order was final if it amounted to a final decision relating to the rights of the parties in dispute in the civil proceeding. If after the order civil proceeding still remains to be tried and the rights in dispute between the parties have to be determined, the order is not a final order within the meaning of Article 133. In a recent judgment of this Court in *Palaniappa* v. *Krishnamurthi*[5] this principle has been accepted which is that a judgment of final order is one which finally decided the rights of the parties without leaving the suit in which the question arose alive or pending. The divergence of opinion, as we find from decided cases arises only in the application of this principle to particular facts or situation.

The main matter in controversy between the parties in the present litigation is as to the character of the properties, whether they constituted a public trust. It was with reference to this question the parties were in issue as to whether the suit instituted for settlement of a scheme under section 92, Civil Procedure Code, was maintainable. As far as we have been able to find, there has been no dispute between the parties that if once the character of the properties was decided to be a public trust, even in that event no scheme could be settled. In that sense we are inclined to think that this is a case in which the rights of the parties have been fully and finally decided by this Court and all that is left to the Court below is to carry out the directions of this Court to settle a scheme which is but an ancillary to our decision. Mr. Ahmed Meeran placed strong reliance on *Mohd. Ahmed* v. *M.E. Mekhri*[6], in support of his contention that our decision still leaves the suit alive and the trial Court has yet to frame a scheme and that from this point of view on judgment is not a final one. *Mohd. Ahmed* v. *M.E. Mekhri*[7], did not involve determination of the character of the ownership of the properties, but related only to the framing of a fresh scheme of management. The High Court of Mysore on appeal rejected the contention of the defendants and directed the trial Court to frame a fresh scheme as prayed for by the plaintiffs. In the petition for leave to appead that Court was of the view that the whole question of the mode of management had still to be worked out and that until that was done, it could not be said that a rights of the parties had been finally detrmined. We may observed that so far as the matter before us is concerned, the question did not relate to the mode of management, but the entire controversy centred round whether the suit properties constituted a public trust, and if they did not, whether the suit was maintainable. Reference was made by Mr. Gopalaswami Aiyangar for one of the petitioners for leaves to *Gurdwara Parbandak Commitee* v. *Shiv Rattan Dev*[7]. In that case, the suit was for a declaration and injunction and the High Court having determined the right of the

1. I.R. (1920) 47 I.A. 124: 39 M.L.J. 27: I.L.R. 47 Cal. 918: A.I.R. 1920 P.C. 86.
2. (1933) I.L.R. 11 Rang. 58, 65.
3. (1950) S.C.J. 139: (1949) F.C.R. 842: A.I.R. 1950 F.C. 77.
4. (1962) 1 S.C.J. 713: (1961) 3 S.C.R. 754: (1962) 2 An.W.R. (S.C.) 5: (1962) 2 M.L.J. (S.C.) 5: A.I.R. 1961 S.C. 794.
5. (1967) 2 M.L.J. 1 (F.B.): I.L.R. (1967) 3 Mad. 227: A.I.R. 1968 Mad. 1.
6. A.I.R. 1961 Mys. 104.
7. A.I.R. 1955 S.C. 576.

parties remitted the suit to the trial Court for granting injunction in terms of its orders. The Supreme Court held that it was a final order and leave was rightly granted. This case again reiterates the principle that if rights of the parties have been finally determined by the decision from which leave is sought to appeal, and all that remains to be done by the trial Court is an ancillary question, the judgment or order will be a final one. We are of the view that in this case the remittal of the matter to the trial Court for settlement of a scheme is but a consequential matter flowing from the direction given in our judgment.

On that view, leave is granted and certificates will issue under Article 133 (1) (*a*) of the Constitution. No costs.

R.M. — *Leave granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Zabiya Bibi .. *Petitioner**

v.

A. Sivaperumal .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 26 *rules* 1 *and* 4 *and Order* 16, *rule* 21 (1)—*Issue of commission—Application by plaintiff on ground that he is residing beyond* 200 *miles from the Court—Not entitled to as of right—Difference between witness and party to suit.*

Whether a Commission should be issued for the examination of a witness or not is always a matter of discretion of the Court. But, in exercising the discretion, the Court will have to take into consideration the fact whether the person sought to be examined on such commission is a party to the suit or merely a witness. There is a vital difference between a witness and a party to the suit, because, a witness is not interested in the subject-matter of the litigation and he is a third party to the action but with reference to the parties the same cannot be said. Even as between the parties, there is again a basic difference between the plaintiff and the defendant. The plaintiff is the person who has initiated the action and has chosen the forum and dragged the defendant into the Court. Consequently, with reference to the plaintiff, when he or she wants to give evidence in support of his or her case, the position is different from that of a third party being called to come to the Court to give evidence in support of the plaintiff or the defendant.

Held, the plaintiff cannot claim as a matter of right that a commission should issue to examine her, simply because she is residing 200 miles away from the Court.

Held further (on facts), in any event, it cannot be said that the unusual circumstances under which alone the plaintiff can be exempted from appearance in Court for giving evidence are present in the case.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Additional District Munsif, Salem, dated 7th February, 1966 and made in I.A. No. 2003 of 1966 in O.S.No. 674 of 1965.

N. Appu Rao, for Petitioner.

K. Raman, for Respondent.

The Court made the following

ORDER :—This is an application to revise an order of the learned District Munsif of Salem, dated 7th December, 1966, dismissing an application filed by the petitioner for examining herself on commission. I must straightaway point out that the petitioner is the plaintiff in O.S.No. 674 of 1965 on the file of the learned

*C.R.P. No. 36 of 1967. 18th February, 1968.

District Munsif, Salem. The present I.A. No. 2003 of 1966 for the purpose of examining her on commission was filed on the ground that she was residing 200 miles away from Salem in Nilambur in Kerala State and her husband has been recently discharged from the Mental Hospital and she had been attending on her husband. Th learned District Munsif dismissed the application holding that previously the respondent had filed an application directing the petitioner to be present in the Court and in that application no objection was taken by the petitioner that she could not because of the distance, be present, in Court. The learned District Munsif has further pointed out that Nilambur is not far away from the Court and that there is no difficulty for the petitioner to appear before the Court if she really intended to do so. It is to revise this order the present civil revision petition has been filed.

Mr. N. Appu Rao, learned Counsel for the petitioner, contends that the Code of Civil Procedure, does not make any difference between a witness and a party to a suit and once a person comes within the scope of Order 16, rule 19 Code of Civil Procedure, such a person is entitled to be examined on commission, whether such a person happens to be a witness or a party to the suit. Admittedly, whether a commission should be issued for the examination of a witness or not is always a matter of discretion of the Court. But, in exercising the discretion, the Court will have to take into consideration the fact whether the person sought to be examined on such commission is a party to the suit or merely a witness. There is a vital difference between a witness and a party to the suit, because, a witness is not interested in the subject-matter of the litigation and he is a third party to the action, but with reference to the parties, the same cannot be said. Even as between the parties, there is again a basic difference between the plaintiff and the defendant. The plaintiff is the person who has initiated the action and has chosen the forum and dragged the defendant into the Court. Consequently, with reference to the plaintiff, when he or she wants to give evidence in support of his or her case, the position is different from that of a third party being called to come to the Court to give evidence in support of the plaintiff or the defendant. Therefore I am unable to agree with the contention for the petitioner that there is no difference between a party witness and a third party witness.

In support of his contention, Mr. Appu Rao relied upon on *Gulab Rai Ghutghutia v. Mahendra Nath Sreemani*[1]. Even in that decision, the learned Judge had pointed out that the case of the plaintiff stands on a different footing from that of a defendant or a witness when the question arises as to whether a commission should issue for examination or not, and although in the Code of Civil Procedure there is no distinction drawn anywhere so far as this point is concerned between the plaintiff, a defendant or a witness, yet as a rule of prudence this rule can be supplied. The learned Judge further pointed out that when the plaintiff has chosen the forum and has filed the suit in the forum of his own choice, he is not entitled to have a commission issued unless under very exceptional circumstances. Consequently, the decision of the Patna High Court, far from supporting the contention of Mr. Appu Rao is against him.

On the other hand, Jagadisan, J., in *Ramakrishna Kulwant Rai v. F. E. Hardcastle & Co.*[2], had observed :

"The witness, who is a third party to the action, cannot be compelled to attend Court to give evidence if he is resident at a place beyond 200 miles away from the Court-house ; a party to a suit or proceeding has no such unqualified right. The plaintiff having filed the suit in a forum of his choice or in a forum where the suit had necessarily to be instituted, cannot, except in circumstances of bodily infirmity or other disabling factors, avoid giving evidence in Court. A defendant however, is in a slightly better position. If he is a resident in a far off place, quite a long way from the jurisdiction of the Court, he can pray for the issue of a commission to examine him as a witness......"

1. A.I.R. 1935 Pat. 220.

2. (1962) 2 M.L.J. 490.

The general rule is, and this should not be lost sight of or blurred, that the evidence of a witness in an action, be he or she a party or not, should be given in public Court and tested by cross-examination. Inability to attend Court on grounds of sickness or infirmity, or detriment to the public service, would justify the issue of a commission. The Court has got a discretion to relax the rule of attendance in Court where the person sought to be examined as witness resides beyond the local limits of the jurisdiction of the Court. This discretion may be exercised even if the person happens to be no other than the defendant (See *Subramania Chettiar*, In re[1]. There can, of course, be no rule of law demarcating the boundaries and the area of the discretion to be exercised in these matters. What can however be stated is that the Court of *nisi prius* must act judicially, having regard to all the circumstances of the case, the desirability of the physical presence of the witness in Court to enable it to observe his or her demeanor, and the not unusual fact that convenience and economy of expenses for the applicant may involve his opponent in great inconvenience and considerable expenses."

To the same effect is the observation of Anantanarayanan, Chief Justice, in *A. R. Laksamanan Chettiar* v. *Vadivelu Ambalam*[2], where the learned Chief Justice, after referring to the judgment of Jagadisan, J., referred to above, proceeded to state:

"..........it would be an unusual privilege to exempt the party from attendance in Court merely because he was living beyond the limits of jurisdiction, and permitting him to be examined on commission. Very vital factors in the appreciation of evidence, such as the demeanor of the party under cross-examination, etc. may have to be assessed, and a party ought not to be lightly permitted to escape such scrutiny, by the plea that the party is residing beyond the jurisdiction specified in Order 16, rule 19, Civil Procedure Code, and is hence entitled to be examined on commission."

In view of these decisions, I am of the opinion that the petitioner herein cannot claim as a matter of right that a commission should issue to examine her, simply because she is residing in Nilambur in Kerala State.

In the end, Mr. Appurao strongly relied on Order 16, Rule 21 (1) of the Code of Civil Procedure, as supporting his contention. That rule introduced by the Madras High Court is as follows :—

"When a party to a suit is required by any other party thereto to give evidence or to produce a document the provisions as to witnesses shall apply to him so far as applicable."

This rule also, far from supporting the contention, negatives it. By implication, this rule states that a party not being required by any other party to the cause to give evidence or to produce document, voluntarily gives evidence on his own behalf is not in the same position as any other witness. Rule 21 (2) also confirms this conclusion.

As for the other ground, that her husband was discharged from the mental hospital and the petitioner was attending on her husband, that statement was made more than a year ago and it cannot be said that that ground is still available. In any event, it cannot be said that the unusual circumstances under which alone the plaintiff can be exempted from appearance in Court for giving evidence are present in this case. The learned District Munsif has exercised his discretion in accordance with the law.

Under these circumstances, I do not see any justification for interfering with the order of the learned District Munsif and the civil revision petition is dismissed with costs.

S.V.J. ——— *Petition dismissed.*

1. (1954) 1 M.L.J. 449.

2. (1967) 1 M.L.J. 252 : 80 L.W. 148.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Vaiyapuri Reddy and another .. *Petitioners**

v.

Sivalinga Reddiar .. *Respondent.*

Specific Relief Act (I of 1877), section 28—Suit for specific performance of contract decreed—No period fixed in the decree for payment of consideration—Plaintiff's failure to pay—Defendant's application to rescind contract—Power of Court to grant time for payment.

As the Court has, under section 28 of the Specific Relief Act, the power to extend the period even where it has already fixed a period within which the plaintiff should deposit the amount it should be deemed to have the power to either fix a period or grant a fresh period for the plaintiff to deposit the purchase-money where by the decree it has not already fixed a period.

(Applying the abovesaid principle to the facts of the case, it was held that, even though there had been laches on the part of the plaintiff, the order passed by the lower appellate Court, giving 30 days time to the plaintiff to deposit the amount on the application made by the defendants for rescinding the contract is not one without jurisdiction or one passed in disregard of the principles of equity).

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge, Vellore, dated 7th March, 1967 and made in I.A. No. 784 of 1955 in O.S. No. 134 of 1965.

G. Jagadisa Iyer, for Petitioners.

B. Soundarapandian for *P. R. Gokulakrishnan*, *P. Baskaran* and *K. Venkata Subbaraju*, and *S. Rajagopalan*, for Respondent.

The Court made the following

ORDER.—This is a petition to revise the order of the learned Subordinate Judge of Vellore, in I.A. No. 784 of 1966 in O.S. No. 134 of 1965. This revision petition arises out of a suit for specific performance. Defendants 1 and 2 in the suit are the petitioners. The plaintiff filed a suit for specific performance of a contract to reconvey certain properties, which had been sold on 5th September, 1969 by him and two others to defendants 1 and 2. The claim against the third defendant a purchaser from defendants 1 and 2 of one of the items was given up. Defendants 1 and 2 submitted to a decree and therefore, the decree provided that they should execute a sale-deed and that in the event of default the plaintiff was to have the sale-deed executed by the Court and registered. Unfortunately, the decree did not provide the period within which the plaintiff was to pay the consideration for the sale-deed. The decree was on 27th June, 1966. The plaintiff did not either pay the amount to the defendants or deposit it into Court. Therefore, on 6th December, 1966 on behalf of the defendants, a notice was sent to the plaintiff stating that the money had not been paid to them nor the draft sale-deed submitted for their approval, and, enquiring whether the plaintiff had deposited the said amount to the credit of the defendants. Having received no reply to this notice, the defendants filed on 14th December, 1966 I.A. No. 784 of 1966, out of which the present revision petition arises, under section 28 of the Specific Relief Act, 1963, for rescinding the contract and dismissing the suit. The plaintiff filed a counter saying that he had always been ready and willing and even now ready and willing to perform his part of the contract and pay the purchase-money and take a reconveyance. Even then the amount was not deposited. The interlocutory application was ordered on 7th March, 1967 giving 30 days time to deposit the amount and the amount has been deposited within 30 days provided in the order of the Court. The contention on behalf of the petitioners is that the Court below was not justified

*C.R.P. No. 1031 of 1967. 20th March, 1968.

in granting time to the plaintiff and that in any case the Court could have dismissed their application, but should not have given anytime to the plaintiff on the application made by them (defendants).

The facts which I have already mentioned would show that whatever might have been the position before the date of the consent decree the plaintiff does not seem to have been ready and willing to deposit the amount necessary for getting the reconveyance. The decree was as early as June, 1966. Till December, 1966, he did nothing. Even after he received the notice, he did not send a reply offering to pay the amount to the defendants. Even after the defendants had filed a petition under section 29 of the Act, the plaintiff did not deposit the amount, nor did he deposit the amount till March, 1967, when the lower Court made its order, giving him a further time of 30 days. It is, thus obvious that the plaintiff has not been ready and willing to deposit the amount due to the defendants.

In *Gomathinayagam Pillai* v. *Palaniswami Nadar*[1], it has been pointed out that where a person claims a decree for specific performance, it is for him to establish that he was, since the date of the contract, continuously ready and willing to perform his part of the contract and that if he failed to do so, his claim for specific performance must fail. Their Lordships referred to the observations of the Privy Council in *Adeshir H. Mama* v. *Flora Sasson*[2], where the Privy Council pointed out as follows :—

> "In a suit for specific performance, on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit."

Then the Supreme Court went on to say:

> "The respondent must in a suit for specific performance of an agreement plead and prove that he was ready and willing to perform his part of the contract continuosuly between the date of the contract and the date of hearing of the suit."

Clearly, in this case, after the date of the decree, the plaintiff has not been able to show that he was continuously ready and willing to perform his part of the contract. Indeed it is doubtful, if he had the necessary money with him, considering the fact that from 27th June, 1966, the date of the decree, to April, 1967, when he seems to have ultimately paid the amount after 10 long months. It may be that he has taken advantage of the unfortunate failure of the Court below to specify the period within which, he had to deposit the amount.

It is urged on behalf of the respondent, however, that while the principle laid down by the Supreme Court will apply for a decision of the suit itself, after the suit has been decreed, it is only the provisions of sections 28 of the Specific Relief Act that apply and that section enables the Court to extend the period within which the purchase-money should be paid even though it might not have been paid within the period fixed by the Court. The argument is that as section 28 of the Act contemplates that the Court should specify a period within which the amount should be paid and as even in a case where the plaintiff has been ready and willing, it is permissible for the Court to extend the period further, it would be all the more clear that the Court would have such a power to extend the period where in the first instance it does not fix the period within which the money ought to be paid. Speaking for myself if the question had been an open question I would have been prepared to hold that the failure of the plaintiff to pay the money or deposit it expeditiously after the decree in his favour showed that he was not ready and willing to perform his part of the contract and therefore, the defendants' application under section 28

1. (1967) 1 S.C.R. 227 : A.I.R. 1967 S.C. 868.
2. (1928) 55 M.L.J. 523 : L.R. 55 I.A. 360 : A.I.R. 1928 P.C. 208.

of the Act should be allowed. A Bench of this Court has held in *Abdul Shaker* v. *Abdul Rahiman*[1], that a decree for specific performance is in the nature of a preliminary decree, the original Court keeping control over the action and having full power to make any just and necessary orders therein including, in appropriate cases, the extension of the time, and that the contract is not determined by mere failure of the plaintiff to pay the amount within the specified time. On this point Schwabe, C.J., discussing the legal position observed as follows:

> "Specific performance is an equitable remedy which has been known and used by the Courts of Chancery in England for centuries and appropriate forms of judgment have been approved by learned Equity Judges in England and have now become almost stereotyped: and those at present in use will be found set out in Seton on Judgments under the title Specific Performance. On a perusal of them the first thing to be observed is that not one of those forms contained in the first instance a limit of time for payment of the purchase-money and not one attempt to make payment of the purchase-money by a certain date a condition of the continuance of the rights under the judgment. After the original judgment for specific performance it is the definite practice in England that all consequential relief by reason of any party failing to comply with the terms of the judgment must be sought by application to the Court by which the judgment was passed. Such applications are made by motion in the action showing that in England, after the original judgment the action is by no means ended but remains under the control of the same Court. If the default is made by the purchaser in paying the purchase-money there are several remedies open to the vendor. (1) He may on motion in the action obtain an order fixing a definite time and place for payment and delivery over of the conveyance and title deed and can, after the expiration of that time, levy execution for the amount, if not paid, (2) he may apply by motion in the action for an order rescinding, not the judgment but the contract, and in order to succeed *in such a motion he has to satisfy the Court that there has been a positive refusal, to complete, which it may be observed in the present case, the respondent has certainly not proved.* A similar right is given by section 35 of the Specific Relief Act of 1877. (3) He can enforce his unpaid vendor's lien for the purchase-money and costs. (4) He can by motion in the action obtain an order for sale by the Court of the property when he will be at liberty to bid. The proceeds of the sale are paid into Court and the vendor gets his contract price, interest and costs and the purchaser the balance if any. Where the vendor is in default, the remedies are even more varied. It would seem to be absurd to hold that the mere fact that a date of completion is fixed in the original decree put an end to the action and that the control of the original Court expires on the expiration of that date—and thus substitute in effect for all the known remedies stated above the simple expedient of treating the action and the decree as dead for all purposes and leaving the vendor in undisturbed possession of property....."

The other learned Judge pointed out as follows:

> "But that it is in the nature of a preliminary and not a final decree is, I think placed beyond doubt by section 35 of the Specific Relief Act (section 28 of the present Act). As I read that section, it lays down that when a decree for specific performance of a contract of sale has been passed and the purchaser makes default in payment of the sum which the Court has ordered him to pay, the vendor may either file a fresh suit for recision of the contract or may, in the specific performance suit itself, apply to the Court to rescind the contract. It is perfectly clear that the contract is not determinable or determined by the mere failure to comply with the terms of the decree. It is not determined until the Court orders that it is determined. By the decree for specific performance the Court sets out what it finds the real contract between the parties was, and declares that such a contract exists and gives what it considers a reasonable time within which the contract shall be carried out. - - - - - - - - - - -

1. (1923) 44 M.L.J. 107 : A.I.R. 1923 Mad. 284.

Regarding the decree from this point of view, as a contract, *it is clear in this, case is in most others of the same kind, that time is not of the essence of the contract* and that, until the contract is rescinded by formal order or decree such time for performances not being an essential part of the contract, may be varied by the Court which has declared what the essential terms of the contract are. It is clear as the learned Chief Justice has shown, that it must be within the power of the Court to vary the time within which the contract shall be performed, as difficulties might arise through no fault whatever of the parties preventing performance within the time specified in the decree; *e.g.*, when a third party as within that period set up a *bona fide* claim of title to the property, it may even be necessary to direct specific performance to stand over for a reasonable but indefinite period, until that claim has been adjudicated.

I take it then that where specific performance of sale has not been effected within the period laid down by the decree, it is open (*a*) to the purchaser to apply to the Court for an extension of time for payment of the purchase-money and (*b*) to the vendor to apply either for a final and peremptory order for specific performance or for an order rescinding the contract either immediately or to follow automatically on the expiry of the period peremptorily granted. The original action is thus open until a final decree or order of such a nature and scope is passed, and the original Court has until then ample power to extend the time for specific performance."

Thus, it is obvious that after the decree has been passed even where the decree does not specify the time within which the plaintiff should deposit the amount, it is open to the Court to fix a fresh period or extend the period already fixed, though I cannot accept the argument on behalf of the respondent, that they should not be made to suffer for the failure of the Court to specify the period even in the first instance. But the principles above laid down have, some basis. As pointed out by the Supreme Court in *Gomathinayagam Pillai* v. *Palaniswami Nadar*[1], if the contract relates to a sale of immoveable property, it would normally be presumed that time was not the essence of the contract. Section 28 of the Act seems to really embody this principle. I, therefore, consider that as the Court has, under section 28 of the Act, the power to extend the period even where it has already fixed a period within which the plaintiff should deposit the amount, it has the power to extend that period, it should be deemed to have the power to either fix a period or grant a fresh period for the plaintiff to deposit the purchase-money where by the decree it has not already fixed a period. If we apply this principle to the facts of this case, even though there had been laches on the part of the plaintiff, the order passed by the lower appellate Court is not one without jurisdiction or one passed in disregard of the principles of equity.

The Civil Revision Petition is, therefore, dismissed.

S.V.J. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Loganatha Mudali and others .. *Appellants**

v.

Manikkammal and others .. *Respondents.*

Registration Act (XVI of 1908), section 17 (1) (b)—Settlement deed—Settlor retaining power of revocation if the settlee fails to fulfil certain conditions—Failure by settlee to comply with certain conditions—Revocation of settlement deed—Whether revocation to be effected only by means of registered instrument.

Section 17 (1) (*b*) of the Registration Act pre-supposes the existence of non-testamentary instrument which purports or operates to create, declare, assign,

1. (1967) 1 S.C.R. 227 : A.I.R. 1967 S.C. 868.

*Second Appeal No. 1943 of 1964. 8th April, 1968.

limit or extinguish any right, title or interest to or in immoveable property and does not itself provide that a particular transaction should be carried out only by means of a written instrument. Consequently, if there is a written instrument creating, declaring, assigning, limiting or extinguishing rights in immoveable property, such instrument must be registered. But it is not open to any party to contend that even if there is no other law requiring that particular transaction should be entered into only by means of a document in writing, still by virtue of section 17 (1) (*b*) of the Registration Act, such a transaction can be effected only by means of a registered instrument. In the absence of any other provision independent of section 17 (1) (*b*) of the Act, requiring that the revocation should be effected only by means of a written instrument, it is not possbile to hold that revocation in question must be effected only by a registered instrument, in view of the provisions contained in section 17 (1) (*b*) of the Act.

The question of relieving against any forfeiture or penalty will arise only, if there is actually a penalty. (On facts *held*), it cannot be contended that there is a penalty and that penalty should be relieved by the Court in the exercise of its jurisdiction as a Court of equity.

Appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 125 of 1962, preferred against the Decree of the Court of the Subordinate Judge Chingleput in Orginal suit No. 41 of 1961.

K. Parasaran, for Appellants.

V. Srinivasa Ayyar, and *K. Raman*, for Respondents.

The Court delivered the following

JUDGMENT.—One Jayarama Mudaliar and his four brothers constituted a Hindu undivided family. The said Jayarama Mudaliar by a notice dated 25th August, 1952 brought about a severance of status between him and his four brothers. On 24th September, 1952, he executed a deed of settlement with respect to his one-fifth share in the properties of the family. Under the terms of the deed, he granted the said one-fifth share in favour of the 1st defendant herein and defendants 2 to 7, subject to certain conditions. The 1st defendant was to take steps to have the one-fifth share divided by metes and bounds and to enjoy the same on condition of his paying a sum of Rs. 1,000 on 15th January, every year to the said Jayarama Mudaliar towards his maintenance and another sum of Rs. 1,000 on the same date towards the maintenance of his wife, the 1st repondent herein. Even after the death of Jayarama Mudaliar, the 1st defendant was to pay the sum of Rs. 1,000 to the 1st respondent herein so long as she is alive. The deed further provided that the 1st defendant was to take three-fourths of Jayarama Mudaliar's one-fifth share absolutely from the date of the document itself and to enjoy the same from generation to generation with all powers of alienation. With regard to the other one-fourth of Jayarama Mudaliar's one-fifth share in the family properties, that was also to be in possession of the 1st defendant and the 1st defendant was to enjoy its income, but on the death of Jayarama Mudaliar and his wife, the said one-fourth share, it certain proportions, was to go to defendants 2 to 7 as allotted by the 1st defendant himself. The settlement deed contained the following condition also:

"The further condition of this settlement deed is that it shall be liable to be revoked by the settlor during his life-time and by his wife Manikkammal if she survives the settlor in default of the payment of the annuity of Rs. 1000 each to the settlor and his wife Manikkammal as above mentioned."

Jayarama Mudaliar died on 15th April, 1955. The 1st defendant defaulted to pay the annuity stipulated in the settlement deed and a sum of Rs.4,187 was due by him. Therefore, the 1st respondent herein, namely, the widow of Jayarama Mudaliar, in exercise of the power of revocation conferred by the settlement deed, revoked the settlement and called upon the 1st defendant by notices to deliver possession of the properties and to pay the arrears also. The 1st defendant paid Rs. 2,500 upto a particular stage, but even thereafter he defaulted in payment of the amount. It is

under such circumstances the 1st respondent herein filed O.S.No. 41 of 1961 on the file of the Court of the Subordinate Judge of Chingleput for declaration of her title to one-fifth share in the suit properties as heir of her husband and in consequence of the revocation of the settlement deed executed by him in favour of defendants 1 to 7 and for a partition of the properties into five shares and possession of the plaintiff's one-fifth share therein. To the suit, the impleaded as parties the settlees under the document as well as the representatives of the other brothers of Jayarama Mudaliar. The 1st defendant put forward several contentions, such as, there was no valid power of revocation, since he was not aware that the document contained such a power and he did not consent to such a power of revocation and that in any event, the 1st respondent had no power of revocation and all she could do was to take steps for recovery of the arrears and that the revocation itself should have been effected by means of a registered document and that not having been done, there was no valid revocation. The learned Subordinate Judge, by his judgment and decree dated 5th March, 1962, overruled the objections of the 1st defendant and decreed the suit of the 1st respondent. Against this judgment and decree, defendant 1, 3, 5 to 9, 11 and 14 to 17 preferred A.S.No. 125 of 1962 on the file of the Court of the District Judge of Chingleput. The learned District Judge, by judgment and decree dated 28th September, 1964 affirmed the conclusion of the learned Subordinate Judge and passed a preliminary decree for partitioning one-fifth share of the family properties and for separate possession of the same. It is against these judgments and decrees, defendants 1, 5, 7 to 9, 11 and 14 to 17 have preferred the present second appeal.

Mr. K. Parasaran, learned Counsel for the appellants, put forward three contentions: (1) The revocation has to be effected only by means of a registered instrument, in view of the provisions contained in section 17 (1) (*b*) of the Registration Act and that not having been done, there is no valid revocation. (2) The Court has got power to relieve the penalty of forfeiture provided in the document and the Court in this case should exercise that power. (3) In any event, defendants 2 to 7 have acquired a vested remainder in respect of the one-fourth share of Jayarama Mudaliar's one-fifth share in the family properties and consequently any decree that may be passed in this suit in favour of the 1st respondent can only be subject to the vested remainder created in favour of defendants 2 to 7. I shall deal with these points in that order.

As far as the first point regarding the necessity for a registered instrument for revoking the settlement is concerned, the argument proceeds on a misapprehension. Section 17 (1) (*b*) of the Registration Act pre-supposes the existence of non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish any right, title or interest to or in immovable property and does not itself provide that a particular transaction should be carried out only by means of a written instrument. Consequently, if there is a written instrument creating, declaring, assigning, limiting or extinguishing rights in immovable property, such instrument must be registered. But it is not open to any party to contend that even if there is no other law requiring that particular transaction should be entered into only by means of a document in writing, still by virtue of section 17 (1) (*b*) of the Registration Act, such a transaction can be effected only by means of a registered instrument. For instance, in the Transfer of Property Act, section 54 dealing with the sale, section 59 dealing with the creation of mortgage, section 107 dealing with the lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent, section 118 dealing with exchanges, section 123 dealing with making of a gift and section 130, dealing with transfer of actionable claim, provide, that the transactions dealt with by the said sections must be carried out only by an instrument in writing. Mr. Parasaran has brought to my notice no law which requires that the revocation of a settlement as contemplated by the settlement in question must be effected only by means of a written instrument, which because of section 17 (1) (*b*) of the Registration Act, will have to be registered. Consequently, in the absence of any other provision independent of section 17 (1) (*b*) of the Registration Act, requiring that the revocation should be effected only by means of a written instrument, it is not possible for me to hold that the revocation

in question must be effected only by a registered instrument, in view of the provisions contained in section 17 (1) (*b*) of the Registration Act. Mr. Parasaran, in this context, relied upon the decision of the Supreme Court in *Kashinath Bhaskar* v. *Bhaskar Vishweshwar*[1]. In that case, there was actually a written document coming within the scope of section 17 (1) (*b*) and the Supreme Court pointed out that the document must be registered. It is not the case of the learned Counsel for the appellants in the present second appeal, that there has been a written document executed by the 1st respondent coming within the scope of section 17 (1) (*b*) of the Registration Act and that pursuant to that section it must be registered. Therefore I am unable to accept the contention of the learned Counsel for the appellants that in this case the revocation effected by the 1st respondent is not valid because it has not been effected by means of a registered instrument.

As far as the second question is concerned, the question of relieving against any forfeiture or penalty will arise only, if there is actually a penalty. As already pointed out the settlement in favour of the 1st defendant and others was effected by Jayarama Mudaliar only subject to certain conditions, one of the conditions being the liability of the settlement to be revoked in case of default on the part of the 1st defendant to pay the annuity. Therefore, it cannot be contended that the provision for revocation is in the nature of forfeiture which a Court of equity can relieve against in a particular case. Over and above this, it must be remembered that the transaction in question was a simple settlement and the properties were admittedly valuable ones. Having obtained those properties, if the 1st defendant does not pay the annuity provided for by the very terms of the grant and commits default, the settlor or his wife can exercise the power of revocation conferred by the document itself. It cannot be contended that there is a penalty and that penalty should be relieved by the Court in the exercise of its jurisdiction as a Court of equity. Consequently, in my opinion, this contention also is a result of misapprehension.

As far as the third point is concerned, such a point was not put forward before the Courts below. Mr. Parasaran argues that being a point arising from the terms of the document itself, it is open to him to urge it before this Court in the second appeal. His case is that defendants 2 to 7 in the suit have acquired a vested remainder in respect of one-fourth share of Jayarama Mudaliar's one-fifth share in the family properties and that vested remainder will blossom into an effective and present interest on the death of the 1st respondent herein, and consequently any right which the 1st respondent may get declared in the present suit should not affect the right of defendants 2 to 7 to that vested remainder. On the other hand Mr. Srinivasa Iyer, learned Counsel for the respondent, contends that there is no such vested remainder created in favour of defendants 2 to 7. In view of one admitted circumstance in this case I consider that it is unnecessary to decide that point in this appeal and that admitted circumstance is that defendant 2 to 7 are not entitled to possession of the properties so long as the 1st respondent is alive and the right to possession, if any, will accrue only on the death of the 1st respondent. Therefore, I am of the opinion that it will be in the interests of both the parties to leave this question open so that if the parties are so advised they can agitate the same in separate proceedings when the alleged right of defendants 2 to 7 materialises on the death of the 1st respondent. Consequently the question whether defendants 2 to 7 have acquired any vested right in respect of the one-fourth share of Jayaram Mudaliar's one-fifth share in the family properties which cannot be revoked is left open since that will not affect the right of the 1st respondent to obtain present possession of Jayarama Mudaliar's one-fifth share in the family properties.

Under these circumstances, subject to the reservation made by me in respect of the third of the points enumerated already, the second appeal fails and is dismissed. There will be no order as to costs.

No leave.

S.V.J. ——— *Appeal dismissed.*

1. (1952) S.C.J. 150: (1952) S.C.R. 491: A.I.R. 1952 S.C. 153.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M.M. ISMAIL.

R. Jeeyar Ayyah and others .. *Appellants**

v.

The Idol of Sri Ranganathaswami etc., Devasthanam, Srirangam, by Executive Officer .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 9 *and the Madras Hindu Religious Endowments Act* (*II of* 1927), *section* 44-*B and* (*XIX of* 1951), *section* 35—*Suit under—No relief claimed against Revenue Divisional Officer or the Collector—Failure to implead them as Parties—Maintainability of suit, not affected.*

Madras Hindu Religious Endowments Act (*XIX of* 1951), *section* 35 (2) (d) (*ii*)—*Refusal to resume inam by Collector—Suit, whether maintainable.*

Grant—Nandavanam for rearing flowers for the use of temple—Absence of beneficial interest in the grant to the person in charge of the Nandavanam—Grant for the benefit of the temple and not a personal grant to a community burdened with service.

The plaintiff Devasthanam has not claimed any relief against the Revenue Divisional Officer or the District Collector and that when the Revenue Divisional Officer and the Collector functioned under section 44-B of Madras Act II of 1927 or under section 35 of Madras Act XIX of 1951, they were functioning as quasi-judicial tribunals and therefore it is not necessary to implead them as parties to the suit. Hence, the failure to implead them as parties to the suit does not affect the maintainability of the suit itself.

An order refusing to resume the inam, just as an order resuming the inam, will be an order of the Collector under clause (*a*) of section 35 (2) and consequently, the suit is maintainable under section 35 (2) (*d*) (ii) of the Act.

After considering the various entries in the Inam Fair Register, it was held that it is not a personal inam granted to the Vannar Community, burdened with service, but it is only an inam for the benfit of the temple. No doubt, there is the expression "Dharmadayam" in column 2 and the expression "Hereditary" in column 10. But, neither the use of the expression "Dharmadayam" nor the use of the expression "Hereditary" is conclusive of the fact that the grant was only a personal grant to the Vannar Community. On the other hand, there are certain features, which definitely indicate that the grant was for the benefit of the temple. In column 21 it is said "This is a Nandavanam which contains *Tulasi*, *Malli* and other flower plants". That means that the very Nandavanam itself was the subject matter of the grant and it was not a grant of some other property in support of the Nandavanam or for the maintenance of the Nandavanam. Further, there is absolutely nothing to indicate in any of the entries in the Inam Fair Register that Vannan Narayanan, who was said to be in charge of the Nandavanam, had any beneficial interest in the grant. Though the grant was not directly to the temple, it was virtually and substantially to the temple, since the entirety of the subject matter of the grant was to be maintained as a Nandavanam for rearing flowers for the use of the temple.

For the grant to be for the benefit of the temple, it need not necessarily be directly to the temple itself. Inams may be granted for the support or maintenance of Hindu religious institutions, or they may be granted for the performance of a charity or service connected with Hindu religious institutions.

* S.A. No. 1829 of 1963. 23rd April, 1968.

Appeal against the Decree of the District Court, Tiruchirapalli, in Appeal Suit No. 57 of 1962, preferred against the decree of the Court of the Subordinate Judge of Tiruchirapalli in Original Suit No. 37 of 1958.

T.R. Srinivasa Ayyangar, for Appellant.

R. Gopalaswami Ayyangar, for Respondent.

The Court delivered the following

JUDGMENT.—An extent of 65½ cents of land was granted in inam for the support of a Nandavanam for the use of the pagoda of Sri Ranganathaswami at Srirangam. The Inam Fair Register shows that in 1865 the said inam was in charge of one Vannan Narayanan. There had been litigations between the descendants of Vannan Narayanan and other members of the Vannar Community, wherein the descendants of Vannan Narayanan asserted their personal right to the property, while the other members of the community contended that the property belonged to them. The result of the series of litigations shows that ultimately the dispute ended in favour of the members of the community displacing the personal right claimed on behalf of the descendants of Vannan Narayanan. Thereafter, on 17th June, 1939, one Arumugha Ekali and another, claiming to be the descendants of Vannan Narayanan, executed a release deed in favour of Sri Ranganathaswami Temple stating that they were not able to maintain the Nandavanam and that they were not in a position to render the service arising therefrom. After this, the temple leased out the land to the first defendant in the suit. The first defendant sought to recover possession of the property from the various members of the community in occupation of the property. On the failue of the first defendant to recover possession of the property, the Executive Officer of the temple filed an application under section 44-B of the Madras Hindu Religious Endowments Act II of 1927 before the Collector (Revenue Divisional Officer, Tiruchirapalli) for resumption of the inam and to re-grant the same to the temple. The Revenue Divisional Officer, by his order dated 30th November, 1954, declined to resume the inam, holding that the inam came within the scope of B.S.O. No. 54 (1) (*b*) and therefore resumable only under B.S.O. No. 54 (2) and not under section 44-B of Madras Act II of 1927. The Revenue Divisional Officer also expressed his view that there was no *prima facie* evidence that the grant included both the land and the assessment. Against this order, the Executive Officer of the temple, preferred an appeal to the District Collector. The District Collector, by his order dated 2nd September, 1957, dismissed the appeal holding that the entries in the Inam Fair Register clearly showed that the inam was granted to Vannan Narayanan and not registered in the name of the temple, with the result he concurred with the conclusion of the Revenue Divisional Officer that the inam fell under B.S.O. No. 54 (1) (*b*) and consequently section 44-B of Madras Act II of 1927 did not apply. The Collector also expressed the view, just like the Revenue Divisional Officer, that there was no evidence to show that the inam consisted of the land and the land revenue. Under these circumstances, the temple filed the suit, out of which the present second appeal arises, namely, O.S. No. 37 of 1958 on the file of the Court of the Subordinate Judge of Tiruchirapalli, purporting to be under section 35 (2) (*d*) (ii) of the Madras Hindu Religious and Charitable Endowments Act XIX of 1951, for the purpose of setting aside the orders of the Revenue Divisional Officer and the District Collector and for declaring that the grant was of both the warams and granted in inam for the support of the charity connected with the plaintiff Devasthanam. The first defendant, who had obtained a lease from the Devasthanam, supported the case of the plaintiff. Defendants 13 to 19 resisted the claim of the temple. They put forward several contentions, such as that the property was granted to the Vannar Community and not to the temple and therefore it belonged to them and that even otherwise the Vannar Community had acquired title to the property by adverse possession and consequently the orders of the Revenue Divisional Officer and the District Collector refusing to resume the inam were correct. They also put forward the contention that the suit instituted by the plaintiff Devasthanam under section 35 (2) (*d*) (ii) of Madras Act XIX of 1951 was not maintainable. The learned Subordinate Judge of Tiruchirapalli, after elaborately going into the matter, came to the conclusion that the grant was not made

to the temple though he held that the grant was for the purpose of maintaining a Nandavanam and flowers have to be given for the use of the plaint temple. He came to the further conclusion that the property belonged to the Washermen Community. With regard to the positive case put forward by the defendants, his finding was that the plaintiff could apply for resumption and re-grant, but the right to remain in possession as against defendants on the basis of the original grant, even if the grant is to be construed to be in favour of the plaintiff, had become barred by limitation and adverse possession. With regard to the contention relating to the maintainability of the suit, he came to the conclusion that since the Revenue Divisional Officer and District Collector refused to resume the inam, no suit would lie, as such a suit had not been provided or under section 35 (2) (*d*) (*ii*) of Madras Act XIX of 1951. Hence, by his judgment and decree dated 10th March, 1961, the learned Subordinate Judge dismissed the suit of the temple. Against this judgment and decree, the temple preferred A.S.No. 57 of 1962 on the file of the Court of the District Judge of Tiruchirapalli. The learned District Judge, by his judgment and decree dated 20th March, 1963, reversed the conclusion of the learned Subordinate Judge and decreed the suit of the plaintiff. It is under these circumstances the present second appeal has been preferred by defendants 13 to 19 in the suit.

Mr. T. R. Srinivasa Ayyangar, the learned Counsel for the appellants put forward the following contentions : (1) When the plaintiff-devasthanam claimed the relief of setting aside the orders of the Revenue Divisional Officer and the District Collector, it ought to have made them parties to the suit and not having done so, the suit is liable to be dismissed on that ground. (2) The present suit was not contemplated or authorised by the provisions contained in section 35 (2) (*d*) (*ii*) of of Madras Act XIX of 1951, as there was no order for resumption and consequently the suit was not maintainable. (3) The grant was to the Vannar Community personally, burdened with service, and was not a grant to the temple. I shall deal with these contentions in that order.

As far as the contention that the Revenue Divisional Officer and the District Collector had not been made parties to the suit is concerned, the following features must be noticed : (*i*) Such a contention was not put forward before the Courts below. (*ii*) The learned Counsel though he had taken time for that purpose, was not able to produce any authority to show that the Revenue Divisional Officer and the District Collector are necessary parties to the suit and therefore the failure on the part of the plaintiff-devasthanam to implead them as defendants in the suit was fatal to the maintainability of the suit itself. In my opinion, the contention of the learned Counsel proceeds on a misconception. Admittedly, the plaintiff-devasthanam has not claimed any relief against the Revenue Divisional Officer or the District Collector and that when the Revenue Divisional Officer and the Collector functioned under section 44-B of Madras Act II 1927 or under section 35 of Madras Act XIX of 1951, they were functioning as quasi-judicial tribunals and therefore it is not necessary to implead them as parties to the suit. Hence, the failure to implead them as parties to the suit does not affect the mintainability of the suit itself. Mr. R. Gopalaswami Ayyangar, the learned Counsel for the respondent, drew my attention to a Bench decision of this Court in *Bheemasena Rao* v. *Peda Yella Reddi*[1], where also the interpretation of section 44-B was considered, arising out of a suit filed to set aside the orders of the Revenue Divisional Officer and the District Collector, but those officials were not made parties to the suit. Though the point was not raised and decided in that case, Mr. Gopalaswami Ayyangar relied on the decision merely by way of a precedent, where in another case the Revenue Divisional Officer and the District Collector were not made parties and still the suit was proceeded with and no objection to the maintainability of the suit was either taken or upheld. Apart from this decision, for the reasons I have already indicated, in my opinion, the failure on the part of the plaintiff-devasthanam to implead the Revenue Divisional Officer and the District Collector as defendants in the suit, does not affect the maintainability of the suit. Hence, I overrule the first contention of the learned Counsel.

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1. I.L.R. (1955) Mad. 45 : (1954) 1 M.L.J. 384.

As far as the second contention is concerned, here again, the contention proceeds on a misapprehension. Section 44-B of Madras Act II of 1927 is practically in the same terms, as far as is relevant, as section 35 of Madras Act XIX of 1951. Section 35 (2) (*a*) states that the Collector may, on his own motion, or on the application of the trustee of the religious institution, or of the Commissioner or of any person having interest in the institution, who has obtained the consent of such trustee or the Commissioner, by order, resume the whole or any part of any such Inam (Inams referred to in sub-section (1)) on certain grounds enumerated therein. Clause (*d*) of sub-section (2) states that any party aggrieved by an order of the Collector under clause (*a*) may appeal to the District Collector, within such time as may be prescribed and on such appeal the District Collector may pass an order confirming, modifying or cancelling the order of the Collector. Thereafter, section 35 (2) (*d*) (*ii*) provides for the filing of a suit in these terms :

> "The order of the District Collector on such appeal, or the order of the Collector under clause (*a*) where no appeal is preferred under sub-clause (*i*) to the District Collector within the time prescribed, shall be final :
>
> Provided that where there has been an appeal under sub-clause (*i*) and it has been decided by the District Collector or where there has been no appeal to the District Collector and the time for preferring an appeal has expired, any party aggrieved by the final Order of the District Collector or the Collector, as the case may be, may file a suit in a civil Court for determining whether the inam comprises both the melwaram and the kudiwaram or only the melwaram. Such a suit shall be instituted within six months from the date of the order of the District Collector on appeal where there has been an appeal under sub-clause (*i*), or from the date of the expiry of the period prescribed under sub-clause (*i*) for an appeal to the District Collector where there has been no such appeal."

The contention of the learned Counsel is that a suit is provided only against an order under clause (*a*), which means, only against an order resuming the whole or any part of the inam, and once there has been no order of resumption, that is, where the Collector has refused to resume the inam, no suit has been provided for under the section. There are two answers to this contention. The first answer is, if the section itself does not provide for a suit, it does not mean that an aggrieved party has no right of suit, which is available to him under the general law. So long as the section has not taken away the right, which is available to an aggrieved party, it is immaterial whether the section itself has conferred such a right or not. The second answer is, an order refusing to resume the inam, just as an order resuming the inam, will be an order of the Collector under clause (*a*) of the section. In *Kallalagar Devasthanam* v. *District Collector*[1], a Bench of this Court pointed out that the words "may pass an order confirming, modifying or cancelling the order of the Collector" are not intended to be confined to an order of resumption and that an unqualified right of appeal is given and if the Collector passes an order dismissing an application the District Collector can confirm it or cancel it, and as he has the power to cancel an order refusing to resume an inam, it must follow that he has the power to grant appropriate relief. This decision, with reference to the provision for and the scope of the appeal before the District Collector, will, in terms, apply to those of the suit as well. Therefore, the contention of the learned Counsel for the appellants that, since there has been no order of resumption by the Revenue Divisional Officer or the District Collector, no suit under section 35 (2) (*d*) (*ii*) is available, has no substance.

That leaves the third contention regarding the grant itself. Admittedly, the title deed has not been produced by any of the parties. The entire controversy between the parties proceeded on the basis of the extracts from the Inam Fair

1. I.L.R. (1941) Mad. 36 : (1940) 1 M.L.J. 891 : (1940) 51 L.W. 735.

Register. The plaintiff-devasthanam filed Exhibit A-1, as the Extract from the Inam Fiar Register, while the defendants filed Exhibit B-43. In Exhibit A-1 the inam was described as ' Devadayam ', ,while in Exhibit B-43, it was described as ' Darmadayam.' The learned Subordinate Judge sent for the original and compared the same with Exhibits A-1 and B-43 to find out which of the two copies was correct. The learned Subordinate Judge, after such comparison, came to the conclusion that the description of the inam in Exhibit B-43 alone was correct and proceeded on the basis that the nature of the inam was Darmadayam. As I pointed out already, the inam itself was for the support of a Nandavanam for the use of the Pagoda of Ranganathaswami at Srirangam and that object is found mentioned under column 8 of Exhibit B-43. Under column 9 it was stated that the inam was ' Tax-free." Under column 10 it was stated that it was "hereditary." Under column 15 it was shown "In fasli 1244 Vannan Nandavanam Manager Manyam." In columns 16 to 20, it was shown as "Srirangam Ranganathaswami Koil Nandavanam Inam. In charge of Vannan Narayanan." In column 21 (remarks column) it was stated :

> "This is a Nandavanam which contains *tulasi*, *malli* and other flower plants. The Nandavanam is maintained for the use of the Pagoda. The holder also maintains a water *pandal*. To be confirmed under rule 3, clause 2, Free."

It is on the basis of these entries contained in the Inam Fair Register, the nature of the grant came to be considered by the Courts below. The learned Subordinate Judge took the view that it was a grant made to Vannan Narayanan, as representing the Vannar Community, for the purpose of using the flowers in the Nandavanam to the temple of Sri Ranganathaswami at Srirangam. On the other hand, the learned District Judge came to a different conclusion, holding that the grant was in favour of the temple itself. I have already pointed out that the title deed was not produced by either of the parties. One other thing that has to be noticed is that under column 13 relating to "Name of the original grantee," nothing has been mentioned in Exhibit A-1 or in Exhibit B-43. Therefore, a conclusion has to be arrived at on the basis of the other entries contained in Exhibit B-43. As I stated already, the case of defendants 13 to 19 was that it was a personal inam granted to the Vannar Community, burdened with service to the temple. On the other hand, the case of the temple was that it was granted for the use of the temple. Which of the said two contentions is correct, has to be determined with reference to the said Exhibit B-43. Before proceeding further, I want to make one thing clear. The learned Subordinate Judge came to the conclusion that the grant comprised of both the warams and before the learned District Judge that was not disputed and it was conceded that the grant comprised of both the warams. Consequently, whoever might have been the grantee and for whatever purpose it was granted, before me it was the common case of the parties that the grant comprised of both the warams. Then the only question is, was the grant for the benefit of the temple or a personal grant to the Vannar community, burdened with service. In my opinion, the only conclusion that can flow from the various entries contained in the Inam Fair Register is that it is not a personal inam granted to the Vannar Community, burdened with service, but it is only an inam for the benefit of the temple. No doubt, there is the expression ' Dharmadayam ' in column 2 and the expression "Hereditary" in column 10. But, neither the use of the expression "Dharmadayam" nor the use of the expression "Hereditary" is conclusive of the fact that the grant was only a personal grant to the Vannar Community. On the other hand, there are certain features, which definitely indicate that the grant was for the benefit of the temple. The first feature is the contents in the Remarks column 21. I have extracted the same already. It is said "This is a Nandavanam which contains *tulasi*, *malli* and other flower plants." That means, that the very Nandavanam itself was the subject-matter of the grant and it was not a grant of some other property in support of the Nandavanam or for the maintenance of the Nandavanam. Further, there is absolutely nothing to indicate in any of the entries in the Inam Fair Register that Vannan Narayanan, who was said to be in charge

of the Nandavanam, had any beneficial interest in the grant. In *Hindu Religious Endowments Board* v. *Koteswara*[1], a Bench of this Court pointed out:

> "Where specified charitable payment exhaust the income of the property at the date of the gift, it has been held in several cases that the intention is to devote the whole to charity, but where they do not so exhaust the income, the charitable trust has been limited to the specific payments and subject to that the donees have been held to take beneficially."

As far as the present case is concerned, there is no question of paying any part of the income from the subject-matter of the grant for the benefit of the temple. On the other hand, the entire subject matter of the grant is itself a Nandavanam for the purpose of rearing flowers to be offered to the temple. Consequently, there is absolutely no scope for drawing any inference of personal benefit in favour either of Vannan Narayanan or of any member of the Vannar Community. As pointed out by the Supreme Court in *Beemasena Rao* v. *Pedda Yella Reddi*[2]:

> "The nature of a personal inam burdened with service is that it is meant for the individual to whom it is granted, though the individual is required to perform some service to the temple also."

In this case there is absolutely nothing to show, from the Inam Fair Register, that inam was meant for the benefit of the individual Vannan Narayanan or the community of washermen represented by the said individual. A Bench of this Court in the decision already referred to, namely, *Bheemasena Rao* v. *Pedda Yella Reddi*[3] pointed out, with reference to the word "regrant" occurring in section 44-B:

> "The use of the expression *regrant* is significant and is consistent only with a case where though the original grant might be in favour of an individual service-holder, it was virtually and substantially to the institution to which the service has to be rendered."

Therefore, taking into account the entries contained in columns 8 and 16 to 21 of Exhibit B-43, though the grant was not directly to the temple, it was virtually and substantially to the temple, since the entirety of the subject matter of the grant was to be maintained as a Nandavanam for rearing flowers for the use of the temple. This conclusion of mine that the grant indicated by Exhibit B-43 is not a personal grant to the Vannar Community, burdened with service, but a grant of a religious and charitable nature, gets support from the fact that the inam itself was confirmed under rule 3, clause 2 of the Rules for the adjudication and settlement of the inam lands of the Madras State.

The learned Subordinate Judge has relied on the litigations that took place between the descendants of Vannan Narayanan and the other members of the Vannar Community and on the fact that in the Property Register, required to be maintained by the plaintiff-devasthanam under the provisions of the Hindu Religious and Charitable Endowments Act, this property was not shown as the property belong to the plaintiff-devasthanam and also on the fact that the Commissioner of the Hindu Religious Endowments Board himself had issued notices for payment of contribution to the Vannara Matam, for coming to the conclusion that the grant was not for the benefit of the temple, but for the benefit of the Vannar Community. As I pointed out already, the reason for the Devasthanam not showing the grant as its own property in the Register maintained by it, may be, that the grant was not directly to the temple and that may be the reason again for the Commissioner demanding contribution from the Vannara Matam. As far as the litigations that went on between the descendants of Vannan Narayanan and the other members of the Vannar community are concerned, admittedly, the temple was not a party to these litigations and therefore no inference adverse to the temple can be drawn from these

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1. (1937) 2 M.L.J. 413 : A.I.R. 1937 Mad. 852.
2. (1962) 1 S.C.R. 339 : (1961) 2 M.L.J. (S.C.) 190 : (1961) 2 An.W.R. (S.C.) 190 : (1961) 2 S.C.J. 671 : A.I.R. 1961 S.C. 1350.
3. (1954) 1 M.L.J. 384 : I.L.R. (1955) Mad. 45.

litigations. I may point out here that the learned Subordinate Judge committed an error in confining his attention to the fact whether the grant is to the temple or to the Vannar Community. For the grant to be for the benefit of the temple, it need not necessarily be directly to the temple itself. As B.S.O. No. 54 (A) (*i*) points out, inams may be granted for the support or maintenance of Hindu Religious institutions, or they may be granted for the performance of a charity or service connected with Hindu religious institutions. Once the grant satisfied this description, it is immaterial for the purpose of the case of the plaintiff here whether it was granted to the religious institution itself or to somebody else for the purpose of performing service or charity in the religious institution. Consequently, I am of the opinion that the grant in this case, though not directly to the temple, is a grant made for the support of the charity connected with Sri Ranganathaswami temple, namely, for the maintenance of a Nandavanam for rearing flowers to be offered to the temple.

In view of this conclusion of mine, the second appeal fails and is dismissed. However, I must point out that in view of the limited nature of the scope of the suit instituted under section 35 (2) (*a*) (*ii*) of Madras Act XIX of 1951, no other questions except these, namely, whether the grant was of both the warams and whether the grant was for the support of a charity to be performed in the plaintiff Devasthanam, can arise in this suit. Admittedly, this is not a suit for recovery of possession of the properties from the defendants. Nor has the plaintiff Devasthanam prayed for an injunction to the Collector or the District Collector to resume the inam and re-grant the same to the temple. Under these circumstances, the questions whether the temple has still title to the property or has lost its title to the property, or whether the right to resume the inam is barred by limitation or not, or whether the defendants have acquired title to the property by adverse possession or not, do not arise for determination and the Counsel on both the sides are agreed on this. Consequently, while dismissing the second appeal, I vacate the findings of the Courts below with regard to such questions and the only findings that are relevant for the disposal of the suit and appeal and which I confirm are that the grant was of both the warams and the grant was for the support of the charity, namely, the maintenance of a Nandavanam for rearing flowers for offering to the plaintiff Devasthanam. There will be no order as to costs in the second appeal.

No leave.

S.V.J. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE K. S. RAMAMURTI AND MR. JUSTICE A. ALAGIRISWAMI.

Nagayasami Naidu and others .. *Appellants**

v.

Kochadai Naidu and others .. *Respondents.*

Hindu Law—Adoption—Adoption questioned after the lapse of a long period—Absence of direct evidence—Deed of adoption, not contemporaneous, but executed 30 *years later—Competing sets of documents—Burden of proof, how to be discharged.*

Hindu Law—Admissions of the father advancing his personal interest and at the same time prejudicially affecting the interests of the junior members of the family—If binding upon the sons.

Hindu Law—Acquisition of property in the names of male and female members of a joint family—Presumptions—Presumptions, how rebutted—Burden of proof.

The two main question for determination in the appeal are: (*i*) Whether the first defendant Ayyalu was taken in adoption by Kochadai Naicker in 1914 with the result that Ayyalu and his two sons, plaintiffs 1 and 2 are not entitled to

* Appeal No. 117 of 1961. 24th April, 1967.

any claim or share in the suit properties and (ii) Even if the first defendant and plaintiffs 1 and 2 still continued to be members of a joint family along with the second defendant (the case of the adoption being found against the contesting defendants) are the properties set out in Schedules B to E, the separate properties of the contesting defendants, or, are they joint family properties?

Even though there are no special rules of evidence to establish an adoption, the burden of proving an adoption is a very grave and serious one, as an adoption displaces the natural succession. It is true that if the adoption is questioned after the lapse of a long period, allowance will have to be made for the absence and disappearance of direct evidence of witnesses who had attended and participated in the function and too much importance ought not to be attached to discrepancies in the evidence which would be inevitable if witnesses speak about events and incidents which took place, decades back. A contemporaneous deed of adoption coming into existence at the same time as the adoption took place would no doubt be strong cogent evidence. Again transactions and dealings documents in which reference is made to the adoption in question wherein third parties or relatives referred to status of the person as an adopted son and persons who have knowledge of the family history of the party concerned have referred to that status would be evidence as to the fact of adoption. Conduct of the members of the family, strangers, authorities, public and school authorities, acknowledging and treating the person concerned as an adopted son again would be useful evidence. As the partition between the father of defendants 2 and 1, Alagar Naicker, Thevappa Naicker and Kochadai took place only in 1941, up to that period there is no documentary evidence showing that the first defendant Ayyalu was enjoying the properties along with Kochadai as the latter's adopted son. The enjoyment by all the members of the three branches was all common. Even so, there is documentary evidence of other character, all of which overwhelmingly point to the conclusion that Ayyalu still continued to be the member of his natural family and not given in adoption to Kochadai.

In the absence of any evidence whatsoever, there is no reason why the Court should not proceed on the footing that Exhibit B-7 (deed of adoption) is a genuine document, solemnly executed by Kochadai and attested by his wife, friends and relatives, containing recitals which are absolutely true and correct. The real difficulty that the case presents is that the documents during the first period upto 1944, constitute equally powerful evidence and leads to the irresistiable conclusion that there was no adoption. The evidence during that period too is as strong, overwhelming and convincing, and the problem is how to reconcile those two sets of documents. Reconciliation is impossible as they tend to diametrically opposite inferences and it is here speculation becomes inevitable. If one can speculate, it may be that the documents during the first period reflect the truth and Exhibit B-7 was secured from Kochadai by some overreaching or some unfair means without Kochadai knowing what document he was signing.

If the questions of adoption rested with and concerned the first defendant alone, the matter would assume a different complex, but the question is, how far, are the plaintiffs bound by these admissions of their father and his holding out that he is the adopted son of Kochadai. In the case of joint family, the admissions of the father or the admissions of the managing member would not by their own force bind the other members of the family, and the admissions cannot be used against them on the ground that the managing member or the father as the case may be, did not satisfactorily account for these admissions. The junior members can always prove that the admissions are either untrue or incorrect. If the managing member or the father had made an admission while acting on behalf of the family or for acquiring properties for the family or for protecting the interest of the family and where, what he does is on behalf of himself and on behalf of the members family, the admission made in that representative character may be used against all the members. But, if such an admission was made by the managing member or by the father to advance his own interests and to acquire property

for himself, and what he acquired would be his own acquisition which he is not bound to share with the other members of the sons, such an admission cannot bind the sons. The position is *a fortiori* of such an admission advances not only the personal interest of the managing member or the father but also prejudicially affects the interests of the other members. For instance, in this case, if Ayyalu wrongly made such admissions knowing them to be false and acquires property, it will be his self acquisition. The fact that in that process he claims to be the adopted son will not make the property joint family property, if actually there was no adoption. Further if the admissions were to be held to be binding upon the sons also, the sons will lose their rights by birth in the natural family. As soon as they were born in 1932 and 1937, they acquired rights by birth and how can that right be affected by anything which their father may do subsequently out of greed or in conspiracy with somebody else to exploit the weakness of third parties. Unless there is in law and in fact a valid adoption cutting away Ayyalu from his natural family, the rights of the plaintiffs will have to be adjudicated upon on their own merits and while doing so, the Court will have to take into account the entire facts. If the plaintiffs themselves have made any prior admissions to the contrary, they may also suffer under the same difficulty if they do not satisfactorily account and explain their prior admissions. But so long as they have not made any such admissions the admissions of the father cannot conclude the rights of the sons. How can the rights which the plaintiffs acquired by their birth in the ancestral property be taken away because their father had made certain statements which they themselves do not know how and when they were made or even would have been made despite their protests and objections. In respect of their rights by birth in the ancestral estate, they are not regarded as the representatives of the father. The consequences of the father not explaining or trying to explain his prior statements and admissions cannot be visited upon his sons who have got rights of their own independently of the father.

A man cannot be bound and cannot be called upon to explain what another man has said, why he said so and when he said so. The question, therefore, is whether the totality of the entire evidence for and against, establishes whether Ayyalu has been adopted in 1914. The documentary evidence for the first period is decidedly in favour of the plaintiffs and against the contesting defendants. When we come to Exhibit B-7, it can be only used as a piece of evidence and not as admission ; *i.e.*, the execution of a deed of adoption. For instance, if as early as 1914, a deed of adoption had come into existence contemporaneously along with the adoption though the recitals in the deed would not have the effect of admission by the plaintiffs so as to be bound by them, it would certainly be powerful cognent evidence against the plaintiffs. But in the instant case the deed of adoption was not contemporaneous and it was executed 30 years later. The onus in proving the adoption is very heavy on the person setting up the adoption especially when there is no contemporaneous deed of adoption.

There are competing sets of documents one set tending to establish adoption and another establishing that there could never have been such an adoption. In the instance case the document Exhibit B-7 itself bears intrinsic evidence that the adoption was highly improbable and could not have taken place.

The evidence adduced about the factum of adoption in simply worthless and is wholly insufficient to discharge the grave and serious onus that lies upon the contesting defendants, which onus had become heavier still by reason of the valuable evidence afforded by the documentary evidence during the first period. The conclusion, therefore, is that the contesting defendants have failed to establish that the first defendant was given in adoption to Kochadai.

It has to be recognised that a party cannot be awarded relief on a basis not pleaded by him and on which there is no issue, merely taking advantage of some statements in the pleadings or in the evidence made or given for a different purpose and with reference to a different issue. Such deviation from the pleading is

permissible, very rarely and only in exceptional circumstances, if it can be postulated that the other side has unambiguously and unequivocally admitted, completely the factual or the legal basis on which relief could be moulded. In other words, it is the clear admission of the opposite party in the pleadings that confers jurisdiction upon the Court to award relief on a basis different from one covered by the issues on which parties went to trial. That neither in the pleadings nor in the evidence, is there such a clear unequivocal admission that the acquisitions were made by the two brothers as joint acquisitions with the aid of joint labour and joint skill.

There is an essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family, there is presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of of properties standing in the name of female members. In the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of female members or persons claiming through them, as to the resources of the female members and so to how they acquired the properties in question. If the plaintiff on whom the burden lies adduce no evidence, no further questions arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question.

If a plaintiff, who puts forward a case that a land standing in the name of female member of a family was really purchased benami in her name for some ulterior purpose, does not discharge the burden that is cast upon him, it is unnecessary to examine the defendants' case.

Appeal against the decree of the Subordinate Judge, Dindigul, dated 11th January, 1961 and passed in Original Suit No. 35 of 1958.

M.S. Venkatarama Ayyar, K. Rajah Ayyar, A. Balasubramaniam and *V. Syamalam*, for Appellants.

M. K. Nambiar for *K. K. Venugopal, B. Kalathinathan, R. Ramamurthi Ayyar R. Ramachandran* and *S. Ramalingam*, for Respondents.

The Judgment of the Court was delivered by

Ramamurti, J.—Defendants 2 to 5 have preferred this appeal against the judgment and decree of the Sub-Court, Dindigul, decreeing the plaintiffs' suit for partition of the properties described in the Schedules A to E, attached to the plaint and also the movables and into six shares and allotment of two shares to the plaintiffs 1 and 2, and one share to the first defendant. The second defendant has also been directed to render an account of the income from the properties of the family for a period of one year, September, 1957 to September, 1958, as claimed in the plaint. The following geneological tree, shows the relationship between the parties :—Nagayasami, the second defendant, and Ayyalu, the first defendant, are brothers. The first defendant's sons are the plaintiffs 1 and 2. The second defendant's son is the third defendant, fourth defendant, is the wife of defendant 3, and the fifth defendant, minor Renuka is their daughter. The plaintiffs case is that the second defendant and the members of his branch and the first defendant and the members of his branch are all members of a joint Hindu family, the two branches being each entitled to a half share in all the properties, immovable and movable, claimed in the suit. The plaintiffs also claim that all the properties involved in the suit including those standing in the name of defendants 2 to 5 (Schedules B to E) are also joint family

properties having been acquired by the second defendant with the aid of joint family properties of which he was in possession as manager of the joint family, though the relevant deeds were taken in the individual names of the second defendant and the members of his branch.

The main defence of the contesting defendants 2 to 5 is that about the year 1914, the father of the plaintiffs (Ayyalu, the first defendant in the suit) was given away in adoption to one Kochadai Naicker, the brother of the paternal grandfather of defendants 1 and 2, that after the adoption, the first defendant ceased to be a member of his natural family and became both, legally and factually, a member of the family of his adoptive father, with the result that Ayyalu was not entitled to any share in the properties of his natural family, and his sons, the plaintiffs 1 and 2, are, therefore, equally not entitled to any right or share in the properties. The further case of defendants 2 to 5 is that the several items claimed by them (Schedules B to E) are all their own separate properties and that in any event, the plaintiffs would not be entitled to any claim or share therein. The first defendant sailed with his sons, the plaintiffs, and supported their case.

The trial Court negatived the contentions of the contesting defendants; it did not accept the defendants' case that the first defendant was given in adoption to Kochadai Naicker. It also found that the several items claimed as separate properties of defendants 2 to 5 were all joint family properties acquired out of and with the aid of ancestral properties. Out of a half share belonging to the first defendant, 2/3rds was allotted to plantiffs 1 and 2, 1/3 to the first defendant. Hence the appeal by the defeated defendants. As the first defendant is sailing with the plaintiffs, for the sake of convenience, defendants 2 to 5 are referred to as contesting defendants in this judgment and reference to the first defendant is made separately.

From the geneological tree, it will be seen that one Ayyalu Naicker, the paternal grandfather of defendants 2 and 1 had two brothers, Thevappa Naicker and Kochadai Naicker. This Ayyalu Naicker, the paternal grandfather of defendants 2 and 1 is the senior-most member of his branch and his son one Alagar Naicker is the father of defendants 2 and 1. Ayyalu Naicker died long ago leaving behind him, his son Alagar Naicker and his grandsons, defendants 2 and 1. Thevappa Naicker also died long ago leaving behind him his son Alagarswami. The third brother Kochadai Naicker died on 16th February, 1946. It is the admitted case of both parties that in 1941, there was a partition between the three descendants of the three branches and the plaint A Schedule properties were allotted to the first branch of Alagar Naicker, the fathr of defendants 2 and 1. At that partition, Kochadai Naicker got his 1/3rd share in the family properties. Alagar Naicker, the father of defendants 2 and 1 died on 26th June, 1942. Kochadai Naicker of the third branch had no male issues. He had married twice. Kamakshi his first wife died in 1953. His second wife is one Alagammal. Kochadai Naicker and four daughters through his first wife, Chellammal who died in 1948, Sodammal who died sometime in 1952, Pappammal and Angammal. Sodammal had a son Rangaswami and daughter Angammal who was married to the first defendant Ayyalu. It will be seen that the first defendant Ayyalu has married Kochadai's daughters' daughter Alagammal, the second wife had two daughters: Chinna Angammal and Lakshmi Ammal. Sometime prior to the suit, misunderstandings arose between the parties resulting in magisterial proceedings under section 145, Criminal Procedure Code.

The two main questions that arise for determination in the appeal are: (*i*) Whether the first defendant Ayyalu was taken in adoption by Kochadai Naicker in 1914 with the result that Ayyalu and his two sons, plaintiffs 1 and 2 are not entitled to any claim or share in the suit properties and (*ii*) even if the first defendant and plaintiffs 1 and 2 still continued to be members of a joint family along with the second defendant (the case of the adoption being found against the contesting defendants) are the properties set out in Schedules B to E the separate properties of the contesting defendants, or, are they joint family properties.

The plaintiffs mainly rely upon several events, dealings and transactions amongst themselves and between the third parties evidenced by several documents till about 1946 in support of their case that Ayyalu was not adopted by Kochadai. The contesting defendants rely upon several events and transactions evidenced by documents starting from Exhibit B-7, dated 27th December, 1944, a registered deed executed by Kochadai in favour of the first defendant Ayyalu in which there is a solemn declaration by Kochadai that Ayyalu was adopted by him about 30 years prior to the deed, 1914 and that Ayyalu, ever since the adoption had been living with Kochadai as a member of his family and this deed of adoption, Exhibit B-7 was executed by Kochadai confirming the adoption with a view to avoid difficulties which Ayyalu may experience for absence of a deed of adoption. This deed of adoption is claimed to have been attested by Kamakshiammal, the senior wife of Kochadai and others who are near relatives of this Kamachi. In addition to the documentary evidence adduced on both sides, consisting of dealings and transactions among themselves, between themselvse and strangers, payment of property-tax revenue, change of patta, Court proceedings, etc., the parties also adduced oral evidence on the question of this adoption.

We shall now take up the first question, *i.e.*, whether the first defendant was given away in adoption to Kochadai Naicker in 1914. Even though there are no special rules of evidence to establish an adoption, the burden of proving an adoption is a very grave and serious one, as an adoption displaces the natural succession. It is true that if the adoption is questioned after the lapse of a long period, allowance will have to be made for the absence and disappearance of direct evidence of witnesses who had attended and participated in the function and too much importance ought not to be attached to discrepancies in the evidence which would be inevitable if witnesses speak about events and incidents which took place, decades back. A contemporaneous deed of adoption coming into existence at the same time as the adoption took place, would no doubt be stronger cogent evidence. Again transactions and dealings and documents in which reference is made to the adoption in question wherein third parties or relatives referred to the statuts of the person as an adopted son and persons who have knowledge of the family history of the party concerned have referred to that status would be evidence as to the fact of adoption. Conduct evidence of the members of the family, strangers, authorities, public and school authorities, acknowledging and treating the person concerned as an adopted son again would be useful evidence.

[After discussing the evidence His Lordship proceeded :]

Ayyalu if he had been adopted by Kochadai must have been when he was very young, just a child and by the time of Exhibits A-1 and A-2 (the birth register extracts of the first plaintiff and the second plaintiff respectively in which the first plaintiff when he was born on 4th January, 1932, and the 2nd plaintiff who was born on 19th March, 1937, were referred to as the sons of Ayyalu Naicker, son of Alagar Naicker), deep rooted impression must have been crated in the minds of the relatives about the adoption and one would expect pointed reference to Ayyalu as the adopted son instead of referring to him in his natural family. But learned Counsel, Sri Rajah Ayyar submitted that in relying upon entries in extracts of Birth Registers, it will be unsafe to rely upon all the particulars mentioned threin and that the use of the entries in the Birth and Death Register extracts should be restricted to the limited information or limited details which the Officer concerned is enjoined by law to record and any extraneous information outside the precise ambit of the entries should be eschewed. Columns 9, 10 and 11 only require the officer concerned to record the name of the father of the child, the name of the mother of the child and the residence. He is not expected to record the further information concerning the details of either the father or the mother or their parentage, their ancestral history, etc. Under section 35 of the Evidence Act, it is only the entry made by a public servant in the discharge of his official duties that is admissible as a relevant fact (Vide *Ramalinga Reddi* v. *Kotayya*[1], in which entries in Birth Registers kept by village officers were held

1. (1917) I.L.R. 41 Mad. 26 : 33 M.L.J. 60.

to be admissible under section 35 of the Evidence Act. Vide also *Bagiammal* v. *Kamalammal*[1]. Sri Rajah Ayyar drew our attention to some of the cases in which this note of caution was indicated that other particulars not strictly covered by the entries are not admissible under section 35 of the Evidence Act. In *Venkayamma* v. *Gangayya*[2], a Bench of this Court held that an entry in the Death Register extract is not admissible to prove the age on the date of death, even though that factum was also recorded. Again in *Gurusami Nadar* v. *Irulappa Konar*[3], in a Death Register extract, a particular person was described as a Christian and the learned Judge Varada chariar, J., observed that at best it is safe to rely upon these registers only with reference to the fact of death and the date of birth. Here in Exhibit A-1, the Birth Register Extract, column 7 relates to particulars of the child's nationality and caste, but no such information is required to be recorded with reference to the particulars of the parents in columns 9 to 11. Our attention was also drawn to *The State* v. *Kamruddin*[4], in which the name of the child was recorded and it was held that it was inadmissible under section 35 of the Evidence Act on the ground that each and every entry made in the register does not by itself become admissible under the Evidence Act and the entries do not require the officer to record the name of the child. Our attention was not drawn to any decision in which it as held that entries like the one in columns 8 and 9 in Exhibits A-1 and A-2 are admissible with reference to the parentage of the father of the new born child. If there is other independent evidence connecting the entries, no doubt the entries and the independent evidence may supplement one another. Here P.W. 2 has not given evidence with respect to the entries 2 in Exhibit A-1 even though columns 12 and 13 purport to refer to him. Again the first defendant has not spoken to the entries in columns 12 and 13, if they purport to refer to him. The fact that no objection was taken as to the admissibility of this evidence does not matter and the objection as to the inadmissibility under the Evidence Act can be raised even in the appellate Court (*vide* page 46 of *Sarkar's Evidence Act* eleventh edition). If somebody who gave the information had given evidence about his knowledge of the relationship, the entry would be corroborative evidence of the evidence of that witness under section 157 of the Evidence Act, but not the entries themselves. We are, therefore, not inclined to attach much significance to the description of the first defendant with reference to his natural family and the absence of reference to Kochadai as the adoptive father.

[After referring to the documentary evidence His Lordship proceeded :]

The resultant position is that Kmakshi, backed up by her grandson Rangaswami (who was then aged 35) attempted to assert and establish rights as the nearest heir to her deceased husband, but could not successfully do so, while on the other hand, the first defendant successfully asserted rights as the adopted son of Kochadai, was actually in possession of Kochadai's properties, paid kist, obtained pattas, mortgaged several items of properties, transported and sold paddy or grain, etc., and continued to do so right till December, 1956, even after Kamakshi's life time.

Learned Counsel Sri Rajah Ayyar placed considerable reliance upon these various categories of documents in support of his contention, the documentary evidence consisting of :

(*i*) conduct evidence of first defendant and third parties;

(*ii*) and clear admissions by the first defendant himself that he was the adopted son of Kochadai.

Learned Counsel invoked the aid of the well-known principle laid down by the privy Council in *Chandra Kunwar* v. *Chaudari Narpat Singh*[5], that what a party himself admits to be true, may reasonably presumed to be so unless the party making the admission gives evidence to rebut the presumption and unless and until that is satisfactorily done, the facts admitted must be taken to be established. He also

1. I.L.R. (1965) 2 Mad. 556.
2. (1933) 65 M.L.J. 703.
3. (1934) 67 M.L.J. 389.
4. I.L.R. (1956) Nag. 282.
5. (1906) I.L.R. 29 All. 184 (P.C.) : L.R. 34 I.A. 27 ; 17 M.L.J. 103.

referred us to a recent decision of Kailasam, J., reported in *Thirumal Reddiar* v. *Koppiah Reddiar*[1], in which the learned Judge upheld the case of adoption based upon the admissions of the party concerned in a series of documents, which admissions were not satisfactorily explained. The learned Judge has discussed all the relevant cases in which, even though there was no proof relating to the factum of adoption, either with regard to the giving and taking or in regard to the observances of the necessary ceremonies, the adoption was upheld on the ground that the party who had admitted the adoption had not satisfactorily explained as to why such admissions were made. It is sufficient to set out following head note:

> "It is no doubt true that the burden of proving an adoption is initially on the party asserting it. *But where the defendant has himself admitted in a series of documents that the plaintiff is* the adopted son of A the burden of proving that *there was in fact no such adoption shifts to the defendant.* What a party himself admits to be true may reasonably be presumed to be so. As it could not, however, be a case of estoppel, the party making the admission may give evidence to rebut this presumption. But unless and until that is satisfactorily done, the fact admitted must be taken to be established. Proof of admissions by the opposite party shifts the onus." (italics ours).

At this stage, it may be mentioned that in *Chandra Kunwar* v. *Chaudari Narpet Singh*[2], the Privy Counsel upheld the factum of adoption, because the party who admitted the adoption offered explanations with regard to his admissions which were found to be either absurd or unproved and the admissions were, therefore, given full effect. In the case decided by Kailasam, J., the lower appellate Court held *that the factum of adoption had not been satisfactorily proved, despite the admissions of the party concerned in several documents.* But Kailasam, J., reversed that judgment, taking the view that the recitals which constituted powerful admissions, threw the burden upon the other side and as the burden had not been discharged by satisfactory explanation, as to why such admissions were made, there *was no need for further proof of the factum of adoption and the party* should be held bond by what he had already admitted.

It is true that these admissions were made by the first defendant, after disputes had arisen, between himself on the one side, and the heirs of Kochadai on the other. On behalf of the respondents, it is urged that the probative value of these admission which are *post litem mortem* consisting of assertions of right by Ayyalu, is very little as there was contest between himself on the one side and Kamakshi and her partisans on the other. But Sri K. Rajah Ayyar accepted the position that if these documents were relied upon by the first defendant, in proof of his adoption as instances in which the first defendant had asserted right as adopted son, their probative value will be very little. But his contention is that the contesting defendants have relied upon these admissions as against the first defendant and in such a context, these admissions constitute valuable evidence. He further contended that the proper perspective of approach is first to take the documentary evidence during the second and third periods, 1944 to 1948 and 1948 to 1956, and ascertain how far the first defendant had given true and satisfactory evidence, explaining the admissions made by him and if on that question, the first defendant had proved himself to be a liar and his explanations are absurd, fantastic and incredible, he must be bound by his admissions and the question as to what weight should be attached to the documentary evidence for the first period and as to how far that evidence disproves the factum of adoption does not arise at all. His further contention is that the documentary evidence during the first period in which third parties dealt with Ayyalu as a member of his natural family or he himself claimed, still to belong to the natural family, cannot out-weigh the effect of the evidence during the second and third period consisting of admissions by the first defendant. His further contention was that is the first defendant has candidly admitted, why Exhibit B-7 (deed of adoption) came to be executed, why the various false recitals were made and why in the

1. (1966) 2 M.L.J. 155.
2. (1906) I.L.R. 29 All. 184 (P.C.): L.R. 34 I.A. 27 : 17 M.L.J. 103.

numerous documents, the first defendant claimed to be the adopted son, the position may be different. For instance, by way of illustration Counsel said that if the first defendant had deposed that Kochadai was very old, of a very weak intellect and could not understand the implications of any document he was executing, and that taking advantage of that situation, Exhibit B-7 was brought into existence, with false recitals or on a fraudulent misrepresentation that the document was of a different character altogether the Court may accept that explanation as naturally explaining the recitals therein, in the face of the documentary evidence to the contrary, during the earlier period. But where the first defendant had denied everything and took up the extreme step of totally disassociating himself from every event, putting the whole responsibility upon the second defendant, there is no justification for not pinning him down to what he had already admitted. If there were infirmaties attached to Exhibit B-7, if any fraud or unfair practice was practised in securing Exhibit B-7 both defendants 1 and 2 must be equally aware of the same and the first defendant may well not confess before the Court that both defendants 1 and 2 conspired together and exploited and took full advantage of the position in which Kochadai was placed. In other words, learned Counsel urged that on what ground and with what justification, Exhibit B-7 can be brushed aside when the clear admissions contained therein remain wholly unaccounted for.

(After considering the deed of adoption and discussing the evidence the Court said:)

To sum up, in the absence of any evidence whatsoever, we do not see any reason why the Court should not proceed on the footing that exhibit B-7 is a genuine document, solemnly executed by Kochadai and attested by his wife, friends and relatives, containing recitals which are absolutely true and correct. The real difficulty that the case presents is that the documents during the first period up to 1944, constitute equally powerful evidence and leads to the irresistible conclusion that there was no adoption. The evidence during that period too is as strong, overwhelming and convincing, and the problem is how to reconcile those two sets of documents. Reconciliation is impossible as they tend to diametrically opposite inferences and it is here speculation becomes inevitable. If one can speculate, it may be that the documents during the first period reflect the truth and Exhibit B-7 was secured from Kochadai by some overreaching or some unfair means without Kochadai knowing what document he was signing. It may again be that the second defendant with his influence in the locality, got the attestors to this document and got Kamakshiammal also to attest the document, without her knowing what the document was. Of course, this is a pure speculation, which if true, furnishes the solution. If only the first defendant had put forward this version or some other plausible explanation about the state of mind of Kochadai and how Kochadai executed the document whether without knowing the contents or under a misrepresentation, the position would be different. It is because of the totally unhelpful and false evidence of the first defendant, pretending ignorance at every stage, that the problem arises.

If the question of adoption rested with and concerned the first defendant alone, the matter would assume a different complex, but the question is, how far, are the plaintiffs bound by these admissions of their father and his holding out that he is the adopted son of Kochadai. In the case of joint family, the admissions of the father or the admissions of the managing member would not by their own force bind the other members of the family, and the admissions cannot be used against them on the ground that the managing member of the father as the case may be did not satisfactorily account for these admissions. The junior members can always prove that the admissions are either untrue or incorrect. If the managing member or the father had made an admission while acting on behalf of the family or for acquiring properties for the family or for protecting the interest of the family and where, what he does is on behalf of himself and on behalf of the members of the family, the admission made in that representative character may be used as against

all the members. But, if such an admission was made by the managing member or by the father to advance his own interests and to acquire property for himself, and what he acquired would be his own acquisition which he is not bound to share with the other members or the sons, such an admission cannot bind the sons. The position is *a fortiori* if such an admission advances not only the personal interests of the managing member or the father but also prejudicially affects the interests of the other members. For instance, in this case, if Ayyalu wrongly made such admissions knowing them to be false and acquires property, it will be his self acquisition. The fact that in that process he claims to be the adopted son will not make the property joint family property, if actually there was no adoption. Further if the admissions were to be held to be binding upon the sons also, the sons will lose their rights by birth in the natural family. As soon as they were born in 1932 and 1937, they acquired rights by birth and how can that right be affected by anything which their father may do subsequently out of greed or in conspiracy with somebody else to exploit the weakness of third parties. Unless there is in law and in fact a valid adoption cutting away Ayyalu from his natural family, the rights of the plaintiffs will have to be adjudicated upon on their own merits and while doing so, the Court will have to take into account the entire facts. If the plaintiffs themselves have made any prior admissions to the contrary, they may also suffer under the same difficulty if they do not satisfactorily account and explain their prior admissions. But so long as they have not made any such admissions the admissions of the father cannot conclude the rights of the sons. How can the rights which the plaintiffs acquired by their birth in the ancestral property be taken away because their father had made certain statements which they themselves do not know how and when they were made or even would have been made despite their protests and objections. In respect of their rights by birth in the ancestral estate, they are regarded as the representatives of the father. The consequences of the father not explaining or trying to explain his prior statements and admissions cannot be visited upon his sons who have got rights of their own independently of the father. Reference may be made to the Bench decision of the Nagpur High Court, in *Jagmohan* v. *Ranchodas*[1], in which it was held that in a joint Hindu coparcenary a son does not derive interest in the coparcenary property through his father and hence the son cannot be said to be the representative in interest of the father under section 21 of the Evidence Act, which deals with the binding nature of admissions. The same view was held about the scope of section 21 of the Evidence Act in the decision in *Nagendra Nath Ghosh* v. *Lawrence Jute Co., Ltd.*[2], in which it was held the admission of a member of a Hindu family cannot be used as against the other members of the joint family. Reference may also be made to *Pratap Kishore* v. *Gyanendranath*[3] in which it was held that admissions about the factum of adoption cannot be used as against the other members of the joint family. On the same principle it has been held that in a suit on a mortgage executed by the father where the father has unambiguously admitted the receipt of the consideration, the admission is held *prima facie* proof against the father only and a decree is passed against him. But as against the sons, the admission of the father cannot be used with that effect and the burden will be upon the mortgagee to prove that he advanced the loan. (Vide the decision of the Privy Council in *Thakur Bhagwan Singh* v. *Bishambhar Nath*[4],. In *Sreeramulu* v. *Thandava Krishnayya*[5], this decision of the Privy Council was followed and it was held that if the mortgagee wanted to enforce his mortgage rights against the sons' interests the mortgagee would have to establish that the mortgage had been executed by the father either for legal necessity or for payment of an antecedent debt and the recitals by the mortgagor alone would be insufficient against the sons to shift the onus of proof. Some of the decisions of this Court have held that the admission contained in the recitals in documents as against the executant has no application upon persons who get the property in their own right. The same view was taken in *Muthachi* v. *Kandaswami Muthirian*[6], This rule is based upon elementary com-

1. I.L.R. (1945) Nag. 892.
2. A.I.R. 1921 Cal. 197.
3. A.I.R. 1951 Orissa 313.
4. (1940) 2 M.L.J. 452 (P.C.).
5. (1942) 2 M.L.J. 452.
6. (1945) 1 M.L.J. 207.

monsense that a man cannot be bound and cannot be called upon to explain what another man has said, why he said so and when he said so. The question, therefore, is whether the totality of the entire evidenc for and against, establishes whether Ayyalu has been adopted in 1914. The documentary evidence for the first period, as observed earlier, decidedly in favour of the plaintiffs and against the contesting defendants. When we come to Exhibit B-7, it can be only used as a piece of evidence and not as admission; *i.e.*, the execution of a deed of adoption. For instance, if as early as 1914, a deed of adoption had come into existence contemporaneously along with the adoption though the recitals in the deed would not have the effect of admission by the plaintiffs so as to be bound by them, it would certainly be powerful cogent evidence against the plaintiffs. But in the instant case the deed of adoption was not contemporaneous and it was executed 30 years later. The onus in proving the adoption is very heavy on the person setting up the adoption especially when there is no contemporaneous deed of adoption. (Vide *Pratap Kishore* v. *Gyanendranath*) [1]. As the adoption results in changing the course of succession and depriving several persons of their rights in properties, high standard of proof has been uniformly insisted upon for proving an adoption and the evidence to support it should be such that it is free from all suspicions of fraud and so consistent and probable as to leave no occasion for doubting the truth (*vide Kishori Lal* v. *Mt. Chaltibai*[2], and *Gokul Chandra* v. *Biswanath*[3]. In *Dal Bhahdur Singh* v. *Bijai Bahadur Singh*[4], it was observed that *very grave and serious onus* rests upon a person who seeks to displace the natural succession of property by the act of an adoption and that in such a case, the proof requires strict and almost severe scrutiny and the longer the time goes back from the date when the adoption was made to the time when it comes to be examined, the more necessary it is having regard to the fallibility of human memory and the uncertainity of evidence given after the lapse of such time, to see that the evidence is sufficient and strong. In *Padmalav Achariya* v. *Srimatyia Fakira Debya*[5], when emphasising the strict standard of proof in proving an adoption, the Privy Council pointed out that the evidence should be free from all suspicion and fraud and so consistent and probable as to leave no occasion for doubting its truth. It was also observed that if the particular adoption is improbable and is not supported by contemporaneous evidence which ought to have been forthcoming and the case of the party setting up adoption is highly suspicious, the adoption cannot be held to have been proved. The relevance of this decision is that in that case, the fact was that the man was aged 30 and he had already had children who had died and he would have himself adopted a son from the other branch of the family at a time when his own wife was *enceinte* and might bear him a natural son as in fact she did it was held that it was improbable that he would have authorised the adoption. Ultimately the defendants' case of adoption was rejected in the view that grave suspicions in which the defendants case was involved were not dispelled and that the adoption in question was highly improbable. In *Raghavamma* v. *Chenchamma*[6], the Supreme Court did not accept the case of adoption as it noticed rival sets of documents one set tending towards the inference of adoption and the other contra. In that case there was no deed of adoption and the Supreme Court observed that Pitchayya who was said to have made an adoption was about 25 years old and had ordinarily every prospect of having children of his own and therefore, it was highly improbable that an adoption would have taken place. Emphasis was also laid upon the absence of a contemporaneous deed of adoption. The rival sets of documents are discussed in paragraphs 15 and 16 of the Judgment of the Supreme Court, the Supreme Court commenting upon the fact (being against the case of adoption) that there had not been a consistent pattern of conduct from which the Court should draw the inference that an adoption must have taken place. An examination of all these cases shows that if there is no contemporaneous deed of adoption and if there is no satisfactory proof of the giving and taking and if the

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1. A.I.R. 1951 Orissa 313, 321.
2. (1959) S.C.J. 560 : A.I.R. 1959 S.C. 504.
3. A.I.R. 1964 Orissa 160.
4. (1929) I.L.R. 52 All. 1 (P.C.) : 58 M.L.J. 446 : 57 I.A. 14.
5. (1931) 60 M.L.J. 619 (P.C.)
6. (1964) 2 S.C.R. 933 : A.I.R. 1964 S.C. 136.

inference of adoption is to be drawn from the recitals in the documents and the assertion of rights in documents dealing with the estate as the adopted son, etc. etc., the documentary evidence must manifest one consistant patern of conduct and if there were rival competing sets of documents, it cannot be said that the grave and serious burden could be said to be discharged. This principle well applies to the instante case. There are competing sets of documents one set tending to establish adoption and another establishing that there could never have been such an adoption. In the instant case the document Exhibit B-7 itself bears intrinsic evidence that the adoption was highly improbably and could not have taken place. When Kochadai had married two wives it cannot be said that Kochadai lost all hopes of begetting natural children.

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It is unnecessary to burden this judgment by a detailed reference to the evidence as we are satisfied that the evidence adduced about the factum of adoption is simply worthless and is wholly insufficient to discharge the grave and serious onus that lies upon the contesting defendants, which onus had become heavier still by reason of the valuable evidence afforded by the documentary evidence during the first period. Our conclusion, therefore, is that the contesting defendants have failed to establish that the first defendant was given in adoption to Kochadai.

Mr. M. S. Venkatarama Ayyar for some of the contesting defendants, raised a new point before us that on the admissions of the plaintiffs and the first defendant in their pleadings as well as in their oral evidence, it must be held that the estate of Kochadai was jointly acquired by defendants 1 and 2 by their joint labour and joint exertion, and the estate should, therefore be, treated and dealt with as joint family property. Learned Counsel urged that on their own showing (*i.e.*, plaintiffs and first defendant), defendants 1 and 2 conspired together set up a false case of adoption and secured the properties of Kochadai, as against the claims of his widows, daughters and their children and that the joint labour and joint exertion consisted in bringing into existence Exhibit B-7, deed of adoption with false recitals, conducting criminal proceedings to a successful termination, fighting the opponents, enterting into several transactions, describing and holding out the first defendant as Kochadai's adopted son and as a result of these efforts, they successfully resisted the claims of the widows, and the daughters of Kochadai. Learned Counsel also urged that the fact that in that process they put forward an unfounded and untenable claim to the property would not detract from the acquisition being a joint acquisition with the aid of joint labour and joint skill of defendants 2 and 1. This aspect based upon the peculiar doctrine of Hindu law of members of a joint family jointly acquiring the property by their joint labour and exertion (without the aid of ancestral nucleus) thereby impressing upon the acquisition the character of joint family property, was developed for the first time before us in the course of the arguments and the only justification pleaded for advancing this argument is that, that question has to be decided only on the admissions of the plaintiffs and the first defendant without any need for taking fresh evidence. Counsel also placed considerable reliance upon the decision of the Supreme Court in *Firm Sriniwas Ram Kumar* v. *Mahabir Prasad*[1], where the Supreme Court granted relief to the plaintiff on an alternative case (though not pleaded by the plaintiff) which was not only admitted in the defendant's written statement, but was expressly put forward as an effective answer to the claims of the plaintiff made in the suit, the reason being that there was nothing improper in giving plaintiff a decree upon the case which the defendant himself admitted. In that case, the plaintiff filed a suit for specific performance of a contract, in part performance of which, the plaintiff had paid a substantial sum of Rs. 30,000 to the defendant. But the defendant denied the contract and pleaded that the money was taken by him only as a loan and not as part payment in pursuance

1. (1951) S.C.J. 261 : (1951) S.C.R. 277 : I.L.R. (1951) 30 Pat. 673 (S.C.).

of a contract of sale. The trial Court found against the plaintiff on the question of the factum and truth of the contract of sale but passed a decree for the sum of Rs. 30,000 accepting the defendant's admission that he had received Rs. 30,000 from the plaintiff. On appeal, though the High Court affirmed the finding of the trial Court that the plaintiff had failed to make out the factum of the agreement of sale, reversed the decision of the trial Court and dismissed the plaintiff's suit even with regard to the decree passed against the defendant for the sum of Rs. 30,000 on the ground that the plaintiff had not pleaded nor sought relief on the basis of such a case. When the matter went on appeal to the Supreme Court, the concurrent finding that there was no agreement of sale was accepted. On the question as to whether on the admission of the defendant that he received Rs. 30,000 from the plaintiff as a loan, a decree could be granted to the defendant, the Supreme Court held that the High Gourt had taken too rigid and technical a view of the matter and that there was ample jurisdiction to the Court to award relief to a party on an alternative basis where the same is admitted by the concerned party in answer to the claim of his opponent.

Mr. M. K. Nambiyar, learned Counsel for the respondents, urged that the facts of the case in *Firm Srinivasa Ram Kumar* v. *Mahabir Prasad*[1], were peculiar and easily distinguishable, and contended that it is not open to a party to allege one set of facts as against his opponent who has denied that case, and then turn round and allege another set of facts with a view to carry on the fight, and claim relief on the ground that his own case was false but that the opponent's case was true, and accepting the same, relief should be granted to him. Our attention was drawn to the decision in *Govindaraj* v. *Kandaswami*[2], which followed the leading decision of the Calcutta High Court in *Ramdoyal* v. *Junmenjoy Coondoo*[3]. Mr. M. K. Nambiyar drew our attention to the decision in *Nagubai* v. *B. Shama Rao*[4], in which it was held that evidence let in on one issue on which the parties went to trial, should not be made the foundation for the decision of another and different matter, which was not present to the minds of the parties and on which they had no opportunity of adducing direct evidence. Learned Counsel also relied upon the following observations of the Supreme Court in *Venkataramana Devaru* v. *State of Mysore*[5], in which it was held that relief should not be granted on a new plea, on a new point, not taken in the pleading nor any issues raised but merely upon the admissions of the party:

> "The object of requring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding. We have accordingly declined to entertain this contention."

It has to be recognised that a party cannot be awarded relief on a basis not pleaded by him and on which there is no issue, merely taking advantage of some statements in the pleadings or in the evidence made or given for a different purpose and with reference to a different issue. Such deviation from the pleading is permissible, very rarely and only in exceptional circumstances, if it can be postulated that the other side has unambiguously and unequivocally admitted, completely the factual or the legal basis on which relief could be moulded. In other words, it is the clear admission of the opposite party in the pleadings that confers jurisidction upon the Court to award relief on a basis different from one covered by the issues on which parties went to trial. Mr. Nambiyar stressed that, however liberally the pleadings (plaintiff's and the first defendant's) may be construed in the instant case, they do

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1. (1951) S.C.J. 261 : (1951) S.C.R. 277 : I.L.R. (1951) 30 Pat. 673 (S.C.)
2. (1956) 2 M.L.J. 578 : I.L.R. (1957) Mad. 1245.
3. I.L.R. (1887) 14 Cal. 791 (F.B.).
4. (1956) S.C.J. 655 : (1956) S.C.R. 451 : A.I.R. 1956 S.C. 593.
5. (1958) S.C.J. 382 : (1958) S.C.R. 895 : (1958) 1 An.W.R. (S.C.) 109 : (1958) 1 M.L.J. (S.C.) 109 : A.I.R. 1958 S.C. 255, 263.

not amount to a clear unequivocal admission either legally or factually, to a plea of joint acquisition by defendants 2 and 1 by their joint labour and joint exertion. We see considerable substance in this argument and we have no hesitation in holding that there is no substance in the new point developed by Mr. M. S. Venkatarama Ayyar and that neither in the pleadings nor in the evidence, is there such a clear unequivocal admission that the acquisitions were made by the two brothers as joint acquisitions with the aid of joint labour and joint skill. The statement of the law of joint acquisition, one method by which property when acquired becomes joint family property, is contained in section 281, page 345 of *Mayne's Hindu Law*, 11th edition.

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In the first place, it has to be observed that the plaintiffs do not plead as a fact that the acquisitions were made by the brothers with their joint labour and joint exertion. The language used is deliberately guarded, *i.e.*, *it is believed* because at that time, they were minors. Secondly, what is pleaded is a specific understanding came to between defendants 1 and 2 that the properties of Kochadai to be divided between defendants 1 and 2 in *some proportion*, after securing the same as against Kochadai's widows and daughters. What is pleaded is not a case of joint acquisition by joint labour and joint skill, which *de hors* any agreement, and by its own force, impresses upon the acquisition, the character of joint family property. The essence of this doctrine of Hindu law is the association of members of a joint family for which nothing else is necessary. Here what is pleaded is a specific agreement or a contract. In the case of joint acquisition in pursuance of a contract rights of the parties would depend upon the terms of the contract express or implied, but in the case of joint acquisition with the aid of joint labour and joint skill, a well-known mode of acquisition of joint family property, the acquisition will have to be shared by all the members, their respective branches in equal shares with rights of birth to all the members. In the case of acquisition by contract, the issues will have no right in the properties jointly acquired.

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Learned Counsel Mr. M.S. Venkatarama Ayyar, then invoked the doctrine of *promissory estoppel* relying upon the decision in *Lyle-Meller* v. *A. Lewis & Co. Ltd.* We are unable to see how that principle has any application to the instant case as there is no basis for the plea and the whole argument, it was conceded by Mr. Venkatarama Ayyar, rested only on what is pleaded in paragraph 11 of the plaint. That promise is bereft of particulars and details. There is no issue, and no evidence was adduced about any particular promise, what proportion of the estate, and what properties of the estate should be given to the second defendant. We are clear that there is absolutely no scope for applying this doctrine of *promissory estoppel* in the instant case.

When the case of the contesting defendants has been throughout that the first defendant is the adopted son of Kochadai and that he got the properties in that right, we see no ground to award relief to the defendants on a totally inconsistent new case that the properties were acquired by defendants 1 and 2, a case totally destructive of the case of adoption. Among other things, a reference to paragraphs 9 and 27 of the written statement of the second defendant would show that according to him, he was never responsible for securing any property of Kochadai Naicker and that Ayyalu got it only by virtue of position as an adopted son and that there was no agreement between defendants 1 and 2, as pleaded in paragraph 11 of the plaint. It is rather strange that the defendants who specifically and categorically deny this particular stand of the plaintiffs in their pleading plaint paragraphs 11 and 21 should now turn round and ask for a relief on a case directly contrary to their own

1. (1956) 1 W.L.R. 29 : (1956) 1 All E.R. 247.

pleadings. For all these reasons, we reject the new point sought to be raised by Mr. M.S. Venkatarama Ayyar, as totally lacking in substance.

We will now take up for consideration point No. 2, *i.e.*, the character of the properties set out in Schedules B to E. This is discussed in paragraphs 66 to 72 of the judgment of the learned Judge. The learned Judge has proceeded on the footing that as the family owned sufficient ancestral nucleus, which would yield an income between Rs. 12,000 and Rs. 16,000 per annum, all the properties set out in Schedules B to E must be held to be joint family properties, as they could have been acquired with the assistance of ancestral nucleus inasmuch as defendants 2, 3, 4 and 5 who claimed these properties as their own separate properties have not made out their own independent separate resources with which these properties could have been or were acquired. Even at the outset, it has to be mentioned that the entire perspective of approach is not correct. There is an essential distinction as to the scope of the presumption in the case of acquisitions in the names of male members of a joint family and the female members of a joint family. In the case of male members of a joint family, there is a presumption that if the joint family had sufficient ancestral nucleus, the properties standing or acquired in the name of junior members are joint family properties unless the presumption is rebutted by showing that the properties are the separate properties of the particular member or members in whose names the properties stand or were acquired. There is no such presumption in the case of properties standing in the name of female members. In the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details, in the pleadings and establish the same by adducing necessary evidence. If there is no pleading and if on the side of the plaintiffs there is no evidence, there is no need for detailed scrutiny of the case of the female members or persons claiming through them, as to the resources of the female members and as to how they acquired the properties in question. If the plaintiff on whom the burden lies adduce no evidence, no further question arises and the female member in whose name the property stands, must be held to be the beneficial owner of the property in question. In Raghavachari's *Hindu Law*, fifth edition, at page 283, foot-note 180, reference is made to some of the cases in which it was held that, the presumption that property in the name of a coparcener is joint family property, is inapplicable where it stands in the name of a non-coparcener such as a female member of a joint family.

Reference may be made to the earliest Bench decision of this Court of Turner, C.J., and Muttuswami Iyer, J., in *Narayana* v. *Krishna* [1], where the law is stated in these terms :

> " There is not, so far as we are aware, any case in which it has been held that, where property stands in the name of a female member of a Hindu family, it is to be presumed that it is the common property of the family, and that it is incumbent on a person who asserts that it is the property of the lady in whose name it stands to prove it. Nor is there any ground on which such a presumption could be founded.
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> Where a family lives in coparcenary, the presumption which exists in the case of male members arises from the circumstance that they are coparceners. On the other hand, the ladies are not in an undivided family coparceners ; whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members, or to place it beyond the risk of extravagance on the part of the male members, such dealings are exceptional and can afford no ground for a general presumption."

The same principle was laid down in a Bench decision of the Calcutta High Court *Protap Chandra* v. *Sarat Chandra* [2], where Mookerjee, A.C.J., pointed out that it was manifestly erroneous to draw the presumption and put the burden of proof on the

1. I.L.R. (1884) 8 Mad. 214, 218. 2. A.I.R. 1921 Cal. 101, 104.

female member to establish that the property is her own separate property. It was pointed out that in the case of coparcener, the presumption is founded on the fact of union and that there can be no such presumption where the property stands in the name of a non-coparcener such as a son-in-law or a female member of the family. In this decision the decision of the lower appellate Court (Sub-Court) was reversed by the High Court because the lower appellate Court (Sub-Court) started with an erroneous presumption against the female members and also threw the burden wrongly upon them. In *Baijnath Das* v. *Bishan Devi*[1], the same view was taken that a female in a joint family not being a member of the family in the sense of having a right in the family property, there is no presumption that the property purchased in the name of a female member is joint family property. We may next refer to the Bench decision of the Calcutta High Court in *Bhuban Mohini Dasi* v. *Kumud Bala Dasi*[2], where again, after referring to a series of decisions, it was observed that there is no presumption that property standing in the name of a Hindu female who is a member of the joint Hindu family belongs to the joint family and is not her stridhana property. The Bench has referred to the statement of the law by the Privy Council in *Diwan Ran Bijai Bahadur Singh* v. *Indrapal Singh*[3], Our attention was also drawn to another Bench decision of this Court of Krishnan and Venkatasubba Rao, JJ. reported in *Offg. Assignee* v. *Natesa Gramani*[4]. The earlier bench decision of this Court in *Narayana* v. *Krishna*[5], was followed and it was observed that it would be *quite an illogical and dangerous doctrine* to say that a lady in whose name the property stands is not its owner and that it must be presumed that the male members of the family are the owners. It may be useful to refer to the following observations of Venkatasubba Rao, J., at page 196:

> "I entirely agree and my only reason for delivering a separate judgment is that a somewhat novel but wholly fallacious argument has been advanced before us with which I should like to deal shortly.
>
> It is contended that when a property stands in the name of a Hindu lady it should be presumed that the real ownership vests in the male members of her family. In the case of a Hindu married woman, her family is the family of her husband and according to this contention, any property standing in her name must be presumed to belong to her husband, her brother-in-law or her son as the case may be. This argument involves in the first place that we must presume that a lady in whose name the property stands is not its owner and that we must secondly presume that the male members of her family are the owners. I cannot conceive of a more illogical or dangerous doctrine. Is there any reason for starting with the presumption that a person is not the owner of the property when the document says she is? Is there again any reason for assuming without proof that the transaction had its origin in some act of the person related in a particular manner to the lady, in whose name the document stands?
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> For this somewhat strange contention the appellant's learned Counsel relied upon *Chunder Nath Moitro* v. *Kristo Komul Singh*,[6] and *Nobin Chunder Chowdhry* v. *Dockhobala Dasi*[7], On the facts, the decisions in these cases may be perfectly correct but if there are any observations in the judgments which may be construed as to lend support to the contention put oreward, I must most respectfully but emphatically disagree with them. I may refer to *Narayana* v. *Krishna*[5], where it was held that when property stands in the name of a female member of a Hindu family, there is no presumption that it is the common property of the family. The person who asserts that the owner is different from the one whose name appears on the face of the document, must prove that he asserts."

It is important to notice that this Bench decision of this Court dissents from the observations made in *Nobin Chunder Chowdaury* v. *Dokaobala Dasi*[7], in which the

1. (1921) I.L.R. 43 All. 711.
2. A.I.R. 1924 Cal. 467.
3. (1899) I.L.R. 26 Cal. 871 (P.C.) : L.R. 26 I.A. 226 : 4 Cal. W.N. 1.
4. A.I.R. 1927 Mad. 194.
5. (1884) I.L.R. 8 Mad. 214.
6. (1871) 15 W.R. 357.
7. (1884) I.L.R. 10 Cal. 686.

view was indicated that the presumption would be against the female member and in favour of the joint family. The Nagpur High Court has taken the same view in the decision reported in *Manikrao* v. *Deorao*[1], In that case, it was observed that the mere fact that husband possessed considerable property raises no presumption that the property found in the possession of the widow belonged to the husband and that it is for the person making the claim to adduce evidence as to the source from which the property was acquired and if no account is given, it has to be held that the property belongs to her. The same view was taken again in *Radha Gobinda Roy* v. *Durgarani Dassi*[2]. This line of distinction between properties standing in the name of a male member and that standing in the name of a female member of the family, whether she is the wife, or the daughter-in-law or the daughter, is well settled and reference in detail to all the decisions aforesaid is really not necessary. But Mr. Nambiyar, learned Counsel for the respondents relied upon the decision in *Narayanaswami* v. *Ramakrisana*[3], as indicating a contrary view, *i.e.*, that the presumption is the same whether it is male or female member of the joint family. We do not think that there is any warrant for that inference from the decision of the Supreme Court. That decision arose out of a suit for partition and the question arose whether the properties standing in the name of the wife, son and the grandson of a male member of the family were joint family properties or the separate properties of these individuals. The Supreme Court observed at page 292 as under:

> " The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleous for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown. Vide *Amritlal* v. *Surath Lal*[4], *Appalaswami* v. *Suryanarayanamurthy*[5]."

With regard to the property standing in the name of the first defendant's son, the position is different. With regard to the property standing in the name of the wife and daughter of the male member, while dealing with the burden of proof and presumption and as to whether the acquisition must be deemed to be with the funds of the first defendant. The Supreme Court, at page 292 has observed thus:

> " It was also argued that acquisitions in the name of the third defendant and the sixth defendant should also be held to have been made with funds advanced by the first defendant himself and so there also should be presumed to have been acquired with joint family funds if it is shown that the joint family had sufficient nucleus for acquiring these at the date of the acquisitions and the first defendant does not show positively that the funds with which they were acquired did not belong to the joint family."

From this sentence it was argued that the Supreme Court was of the view that even in the case of properties standing in the name of female member, there is a presumption in favour of joint family and it should be rebutted by the husband. This sentence should not be divorced from the context and particularly from the important fact that it was not disputed that the acquisition in the name of the wife of the first defendant were made with funds advanced by him. It is also important to notice that in that case, it was clearly admitted that the acquisitions were made in the name of the wife with the funds of the first defendant, the male member and the only question was whether those funds supplied by the male member were his own separate property or the joint family property. On the facts, the Supreme Court held that the funds in the hands of the first defendant male member were his own separate properties. It will thus be seen that the Supreme Court had not to consider situation as in the instant case. We are not prepared to hold that the Supreme Court intended to over-rule the unifrom view taken by all the High Courts in a

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1. A.I.R. 1955 Nag. 290.
2. I.L.R. (1955) 1 Cal. 207, 213.
3. (1965) 1 M.L.J. (S.C.) 78 : (1965) 1 An. W.R. (S.C.) 78 : (1965) 1 S.C.J. 522 : (1964) 7 S.C.R. 490 : A.I.R. 1965 S.C. 289.
4. A.I.R. 1942 Cal. 553.
5. (1947) 2 M.L.J. 138 : I.L.R. (1948) Mad. 440 (P.C.).

series of cases and upset this well settled and well established rule of distinction in the matter of presumption.

There is one other important aspect which the lower Court has completely overlooked. It is the admitted case of the plaintiffs and the first defendant that in 1947, there was an arrangement between defendants 2 and 1 in pursuance of which the second defendant was allowed to enjoy a substantial portion of the ancestral property and the first defendant was given about 15 items, though the items left to be retained by the second defendant and the items taken by the first defendant were not equal. In paragraph 20 of the plaint, there is reference to this arragement. In paragraph 31 of the plaint, it is stated that till 1957, second defendant has given the plaintiffs the amounts due to them, *i.e.*, their share of the income up to 18th September, 1957, which means that so far as the income from the family properties are concerned, second defendant has accounted for the same. In paragraph 23 of the written statement of the first defendant, first defendant states that the second defendant was allowed to be in enjoyment of a major portion of Alagar Naicker's properties, because by that time first defendant secured possession of the properties of Kochadai Naicker. In paragraph (ii) of Exhibit B-319 the counter affidavit filed by the first defendant and his sons, it has been admitted that No. 1 of *A* party (meaning thereby the secondd efendant herein) "was allotted to enjoy a major portion of the estate of the father Alagar Naicker, as a measure of goodwill" and that this will not preclude No. 1 of the *B* party (first defendant) claiming a half share in all the properties left by Alagar Naicker. The relationship between the two brothers was throughout very cordial upto 1957, and in 1947 first defendant was assisted by the second defendant and was thus enabled to successfully resist the claims of the widow and daughters of Kochadai Naicker and that out of gratitude and such other considerations, first defendant allowed the second defendant to be in enjoyment of a substantial portion of the ancestrol estate, *i.e.*, Alagar Naicker's estate and the first defendant was quite prepared and content to take those items mentioned in the pleadings along with the estate of Kochadai. This arrangement which was entered into in 1947 was of course tentative and can at any time be modified or cancelled and will not put an end to or take away the right of the first defendant to claim his legitimate half share in the ancestral estate as and when he decides to secure a partition by metes and bounds. But during all the time when this arrangement was in force, the two brothers will each be entitled to appropriate the income from the properties so allotted for themselves and as between them *inter se* there will be no liability to render an account. The very idea of allotment for convenient enjoyment, though reserving a right to effect a final partition by metes and bounds, carries with it the necessary implication that the two branches were entitled to deal with the income accruing from the properties allotted to them in any manner they like and either branch will have no claim as against the other in respect of properties purchased out of such income. The presumption of Hindu law that if the family owned substantial nucleus every acquisition by a member would be presumed to be joint family property, having been acquired with the aid of joint family property would not apply. The back-ground of the instant case in particular, shows that there was complete identity of interest, absolute cordiality and one-ness between first and second defendants till 1957-58, that the second defendant played a prominent part and helped the first defendant in a great measure, in securing Kochadai's estate, further it was during this period, the first defendant with the active assistance of the second defendant was held out as the adopted son of Kochadai. It will be meaningless and frustrate the very object of the arrangement if we import into this arrangement any liability to render account *inter se* between the brothers for the income. The only logical and rational basis on which this arrangement could be understood and worked out is that the income from the properties allotted to the two branches will belong to the respective branches. The principle of the Bench decision of this Court reported in *Ramayya Goundan* v. *Kolanda Goundan*[1], and the

1. I.L.R. (1940) Mad. 322 : (1939) 2 M.L.J. 639.

recent judgment of Anantanarayanan Offg. C.J., and Natesan, J., in *Venkatasubramania* v. *Easwara*[1], would apply to this case. In the earlier Bench decision it was pointed out that if the joint family has made an allotment of property to a member, in order that he may maintain himself out of it without having to bring its yield into the family granary for common consumption, it is not possible in such a case to make the member accountable for the property so allotted. In that decision it was emphasised that when an arrangement of this kind is made, the predominant idea undoubtedly is that while the corpus of the property should continue to remain joint, the income should exclusively belong to and be at the disposal of the member concerned. It was also pointed out that there was no difference in principle between a maintenance arrangement in favour of a female member of the family and that made almost in similar circumstances to a junior male member of a joint Hindu family. The principle of this decision was followed in *Latchendhora* v. *Chinavadu*[2], in which it was held that properties acquired out of the income and the savings by a member of the joint family shall be deemed to have been acquired by him in circumstances entirely disassociated from the ownership of the joint family property. It was also observed that it would be unjust and inequitable that such properties should also be divided between the others who had nothing to assist the member concerned in acquiring the lands. It was observed as follows at page 36:

> "If out of the income derived from the lands allotted to a member of the joint family for his maintenance, he saves enough to acquire new properties, they must be deemed to have been acquired by him in circumstances entirely disassociated from the ownership of the joint property, to adopt the language of Lord Buckmaster in *Rani Jagadamba Kumari* v. *Wazir Narain*[3], Further, it would be unjust and inequitable that properties acquired by one member out of the income from the lands allotted to his maintenance, should also be divided between others who had done nothing to assist the member concerned in acquiring the lands."

All the cases have been discussed in the recent Bench decision in *Venkatasubramania* v. *Easwara*[1], and it is sufficient to refer to the observations of Natesan, J., at pages 494 to 497. The learned Judge pointed out that the acquisitions out of the savings and income from the joint family property given to the acquirer would not be partible property as between the other members of the family and the branch of the acquirer, but the character of such acquisition in the hands of the acquirer *vis-a-vis* his male children would not be the same.

From the foregoing it has to be held that even if the second defendant had utilised the income from the properties left in his possession during the period 1947 to 1957, to acquire properties whether in his name or in the names of defendants 3 to 5 they are not partible properties. In this view no further question would arise in respect of C, D and E schedule properties, because they were all acquired after 1952. There is the further fact that in paragraph 31 of the plaint, plaintiffs have admitted that till 1957, second defendant had given them their share of the income, with the result that it has to be necessarily held that the acquisitions made by the second defendant during that period must have been only out of the share of the income from the properties of his branch. This is another independent ground on which also it has to be held that the acquisitions during this period cannot be regarded as joint family properties. In this connection it has to be noticed that the properties which have been purchased in the name of the plaintiffs during this period have not been brought into the hotch pot. *Vide* for instance Exhibit B-129 sale-deed, dated 15th July, 1954, in favour of the first plaintiff of an extent of 7 acres. The other 7 acres were purchased in the name of the third defendant. There are also other items. It will be highly inequitable and unjust if the plaintiffs and the first defendant who kept for themselves the properties purchased by them are

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1. (1966) 1 M.L.J. 471 : I.L.R. (1966) 1 Mad. 468.
2. A.I.R. 1963 A.P. 31.
3. (1922) I.L.R. 2 Pat. 319, 325 : 44 M.L.J. 503 (P.C.) : 50 I.A. 1.

allowed to claim a share in the properties purchased by the contesting defendants. The scheme of the purchases themselves show that by common consent, properties purchased in the names of the individual members, were agreed to be their own properties and not partible.

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We are of the view that the learned Judge has been hypercritical in the appreciation of the evidence adduced on the side of the defendants. If a plaintiff, who puts forward a case that a land standing in the name of a female member of a family was really purchased *benami* in her name for some *ulterior* purpose, does not discharge the burden that is cast upon him, it is unnecessary to examine the defendants. case. *Vide* Bench decision of this Court in *Parvatamma* v. *Subbayya*[1].

For all these reasons, we hold that the items of B Schedule 1, 3, 4 and C, D and E Schedule properties are not partible properties and the plaintiffs and the first defendant are not entitled to any share therein.

There cannot be any accounting as between the parties *inter se*. If the second defendant is called upon to render an account during the pendancy of the suit equally the first defendant would be liable to render an account of the income from the properties which were left in his possession. In such case, where several members of the family are put in possession of separate items of properties for convenient enjoyment, the only relief that could be awarded is the relief of partition by metes and bounds, redistributing and reallotting the properties according to their legitimate shares taking into account the value of the properties and such other relevant considerations. If the first defendant had himself filed the suit for partition he could not have asked for accounts in view of the arrangement of 1947. That arrangement is cancelled only by the decision of the Court necessitating a final division by metes and bounds. For all these reasons we hold that the plaintiffs are entitled only to a decree for partition by metes and bounds and it is up to them to take proceedings for the passing of the final decree.

The conclusion is (*i*) The first defendant Ayyalu is still a member of the joint family of the contesting defendants and it is hereby declared that the plaintiffs 1 and 2 are entitled to each one-sixth share and the first defendant another one-sixth share in the A Schedule properties and the movables as per the lower Court decree (*ii*) The B Schedule properties (except item 2) and to C, D and E Schedule properties are not partible properties and the plaintiffs and first defendant are not entitled to any share therein and (*iii*) The plaintiffs and the first defendant are not entitled to the relief of accounting of the income from the properties. Under the peculiar circumstances and facts of this case, we direct the parties to bear their own costs throughout.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

T. Babulal, and another .. *Petitioners**

v.

The Drug Inspector-I, Madras City .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *section* 432—*Validity of enactment under which criminal proceedings are launched—Questioning of —Procedure.*

Drugs and Cosmetics Act (*XXIII of* 1940), *section* 23 (3), *First Proviso and section* 25 (3) *and* (4)—*First Proviso to section* 23 (3) *if invalid as offending Article* 14 *of the Constitution—Constitutional validity of sub-sections* (3) *and* (4) *of section* 25.

In cases where the validity of any enactment is questioned, the procedure is laid down under section 432 of the Criminal Procedure Code. If the petitioner

1. (1931) I.L.R. 55 Mad. 202.
*W.P. Nos. 1731 and 1732 of 1968. 25th April, 1968.

satisfies the Court that the case pending against him involves a question as to the validity of any Act, the determination of which is necessary for the disposal of the case and if the Court is of opinion that such Act is invalid or inoperative but has not been so declared by the Court, it should state a case setting out its opinion and the reasons therefor and refer the same for the decision of the High Court.

The first proviso to sub-section (3) of section 23 of the Drugs and Cosmetics Act which dispenses with the necessity to divide the sample into four portions if the sample is taken from the manufacturer himself, does not offend Article 14 of the Constitution of India. In the case where the sample is seized, say from a dealer, the manufacturer is also given a portion. In such a case, in order to provide a portion to be given to the manufacturer, the sample is divided into four portions instead of three. The validity of the first proviso cannot be challenged as there is no purpose in having an extra portion in cases where the drug is seized from the manufacturer himself.

Nor can sub-section (3) and (4) of section 25 of the Drugs and Cosmetics Act be challenged as invalid as they do not, in any way, affect the fundamental rights of an accused or restrict his right to defend himself adequately before the Court.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavits filed therewith the High Court will be pleased to issue writs of prohibition prohibiting the respondent herein from proceeding against the petitioner in each of the petitions in C.C. No. 8805 of 1968 on the file of the Court of the Chief Presidency Magistrate, Egmore, Madras.

S. K. L. Ratan and *K. A. Panchapakesan*, for Petitioner.

The Court made the following

ORDER —These two petitions are filed for the issue of writs of prohibition directing the Drug Inspector-1, Madras City (respondent in both the petitions) from proceeding against the petitioners in C.C. No. 8805 of 1968 on the file of the Chief Presidency Magistrate, Madras. The Drugs Inspector preferred a complaint against the petitioners in the writ petitions for contravening the provisions of section 18 (*a*) (*ii*) (a) of the Drugs and Cosmetics Act, 1940 (Act No. XXIII of 1940). The case against the petitioners has been taken up on the file by the Chief Presidency Magistrate as C.C. No. 8805 of 1968 and it is pending. In these writ petitions, it is stated that the provisions of the Drugs Act are violative of the Constitution of India and therefore the respondent should be prohibited from proceeding with the criminal case. In cases, where the validity of any enactment is questioned, the procedure is laid down under section 432 of the Criminal Procedure Code. If the petitioner satisfies the Court that the case pending against him involves a question as to the validity of any Act, the determination of which is necessary for the disposal of the case and if the Court is of opinion that such Act is invalid or inoperative but has not been so declared by the Court, it should state a case setting out its opinion and the reasons therefor and refer the same for the decision of the High Court. This procedure has not been followed and on this ground alone these petitions are liable to be dismissed.

As the learned Counsel for the petitioners questioned the validity of sections 23 and 25 of the Act, the contentions will be referred to briefly. Reference was made to the first proviso to sub-section (3) of section 23 which states that if the sample is taken from the premises whereon the drug or cosmetic is being manufactured, it shall be necessary to divide the sample into three portions only. In cases where the sample is taken form any other premises it is necessary to divide it into four portions. The necessity to divide the sample into four portions is dispensed with if the sample is taken from the manufacturer. It was submitted that the first proviso offends the equal protection of laws guaranteed under Article 14 of the Constitution. Obviously in the case where the drug is taken from the manufacturer, the manufacturer himself is not given one portion. In the case where the sample is seized say from a delaler the manufacturer is also given a portion. In

such cases, in order to provide a portion to be given to the manufacturer, the sample is divided into four portions. The validity of the first proviso cannot be challenged as there is no purpose in having an extra portion in cases where the drug is seized from the manufacturer himself. It may be in this case, the two petitioners may come under the definition of manufacturer as the petitioner in W.P.No. 1731 of 1968 who was doing the packing would also be a manufacturer by virtue of the definition. But this would not in any way affect the validity of the first proviso to sub-section (3) of section 23. The validity of section 25, was attacked. Sub-section (3) provides that the report signed by a Government Analyst shall be evidence of the facts stated therein and such evidence shall be conclusive unless the person from whom the sample was taken has within twentyeight days of the receipt of a copy of the report notified in writing the Inspector or the Court before which the proceedings are pending that he intends to adduce evidence in controversion of the report. Sub-section (4) makes provision for sending the sample to the Director of the Central Drugs Laboratory. Provision is made in several enactments including the Criminal Procedure Code for reception of the reports of analyst. Section 510 (1) provides that any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, or the Chief Inspector of Explosives or the Director of Finger Print Bureau or an officer of the Mint upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under the Code may be used as evidence in any inquiry, trial or other proceeding under the Code. Sub-section (2) provides that if the Court thinks it shall on the application of the prosecution or the accused summon and examine any such person as to the subject-matter of his report. It may be that under the Drugs Act the report of the Government Analyst is treated as conclusive but sufficient safeguard is provided for the person aggrieved to adduce evidence in controversion of the report by following the procedure laid down in the sub-section. This provision cannot be said to affect any of the fundamental rights of the petitioners for ample safeguard is provided for assuring him of fair and proper enquiry before the Court. The validity of sub-section (4) of section 24 is also challenged on the ground that report of the Director of the Central Drugs Laboratory is treated as conclusive of the facts stated therein. The proceedings under sub-section (4) is in addition to the right of the person to adduce evidence in controversion of the report of the Government Analyst. Under sub-section (4) the Court may of its own motion or at the request of the complainant or the accused cause the sample of the drug or cosmetic to be sent for test or analysis to the laboratory under the control of the Director of the Central Drugs Laboratory. The report of the Director of the Central Drugs Laboratory and the result thereof are treated as conclusive evidence of the facts stated therein. It does not necessarily follow that the Court should accept what is stated in the report as conclusive. I am unable to see how the provisions of sub-section (3) or sub-section (4) of section 25 in any way affect the fundamental rights of the person himself or in any way restrict his right to defend himself adequately before the Court. There is no substance in any of the contentions raised.

The petitions are dismissed.

V.M.K. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Seetharama Iyengar .. *Appellant**

v

Veeraraghava Pillai and another .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rule* 66 (2) (c) *and third proviso to rule* 90—*Scope—Sale proclamation—Failure to mention the judgment-debtor's valuation in subsequent proclamations—No substantial injury to the judgment debtor as a result of this irregularity—Sale, if could be set aside on the ground of this irregularity.*

In the wording of Order 21, rule 66 (2) (*c*), Civil Procedure Code, each sale proclamation should have mentioned the value of the property as stated by the judgment-debtor. In the present case, though initially the judgment-debtor's valuation was mentioned in the sale proclamation as required by Order 21, rule 66 (2) (*c*), that was not repeated in the subsequent proclamations. But as a result of this irregularity, the judgment-debtor has not sustained any substantial injury. Hence, under the third proviso to Order 21, rule 90, Civil Procedure Code, this Court is precluded from setting aside the sale on the ground of this irregularity.

Appeal against the order of the Court of the Subordinate Judge, Chidambaram, dated 29th January, 1966 and made in C.M.A.No. 5 of 1965, E.A.No. 440/65 in District Munsifs Court, Chidambaram in Cuddalore D.M.C. O.S.No. 442/61.

K. Raman and *R. Sitaraman*, for Appellant.

K. Sarvabhauman and *T. R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT :—This appeal filed by the judgment-debtor arises out of an application, E.A.No. 440 of 1965, which he filed under Order 21, rule 90, Civil Procedure Code, to set aside a sale on the ground of alleged irregularity and illegality. The properties are wet lands in Chidambaram Taluk of an extent of 2 acres 63 cents, but they were subject to a mortgage of Rs. 19,500. Some other properties also were included in the mortgage, though we do not have any precise estimate of the relative values of those properties and the lands in question.

The property was put up for sale on three successive occasions and was only on the last occasion they were sold for Rs. 795 subject to the encumbrance of Rs. 19,500. This therefore works out to the sale price of about Rs. 75 per cent. The judgment-debtor's contention is that the lands would be worth Rs. 100 per cent and therefore even subject to the mortgage, the lands should have fetched the price of nearly Rs. 7,000, and that is how he pleads prejudice. Actually, his grievance is that though initially his valuation of Rs. 100 a cent was mentioned in the sale proclamation as required by Order 21, rule 66 (2) (*c*) that was not repeated in the subsequent proclamations, and in particular in the proclamation which resulted in the impugned sale held on 22nd February, 1965. His further grievance is that he was not given any notice when the upset price was successively reduced from Rs. 10 per cent (subject to the encumbrance) to Rs. 7 on the last occasion. Yet another grievance of his is that the Court should not have simply mentioned that the lands in question and other properties were subject to an encumbrance of Rs. 19,500, but should have further apportioned the approximate liability of the 2 acres 63 cents, and that if that had been done, the properties might have fetched a higher value.

The contentions were overruled by the executing Court and on appeal by the learned Subordinate Judge and hence this further appeal by the judgment-debtor.

The Courts below have expressed the opinion that under Order 21, rule 66 (2) (*c*), Civil Procedure Code, it is not necessary that the judgment-debtor's valuation

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* A.A.A.O. No. 101 of 1966. 2nd July, 1968.

should be mentioned in each of the successive proclamations of sale. They think that it was sufficient that it was mentioned in the first proclamation of sale. I think however that on the wording of Order 21, rule 66 (2) (*c*) Civil Procedure Code, each sale proclamation should have mentioned the value of the property as stated by the judgment-debtor. But I am unable to find that the judgment-debtor has sustained substantial injury as a result of this irregularity, and hence under the third proviso to Order 21, rule 90, Civil Procedure Code, I am precluded from setting aside the sale on the ground of this irregularity. The crux of the matter is that mentioning the judgment-debtor's valuation as Rs. 100 per cent would not have really improved matters when we find that it was mentioned in the first proclamation and there were no bidders on the prior occasions when the upset price was Rs. 10, 7 or 5. I agree with the learned Subordinate Judge that the Court was not obliged to give a notice specifically to the judgment-debtor on each of the occasions when the upset price was reduced and that since as a matter of practice the execution petition was adjourned to particular dates and the reduction of the upset price was effected only on those adjourned dates, it was the duty of the judgment-debtor to be present and acquaint himself with what happened.

The last point is whether the Court should have apportioned the approximate liability of the 2 acres 63 cents in respect of the mortgage amount. Here, it does not appear that the judgment-debtor furnished any particulars to enable the Court to do so, and he does not appear to have made any request to the Court that that should be done. When he himself did not move in the matter, it was not incumbent on the executing Court to undertake this task. Even before me, the learned Counsel for the appellant is not able to furnish information about the relative liability of the 2 acres 63 cents and the other properties subject to the encumbrance.

It follows that this appeal has got to be dismissed. The learned Counsel for the appellant, however, prays that I may make a declaration that since the 2 acres 63 cents have been sold subject to the encumbrance of Rs. 19,500, the encumbrance has been discharged in full and that the mortgagee will not be entitled to proceed against the other encumbered properties. The mortgagee is absent and though *prima facie* it looks as though the learned Counsel is correct in his submission that the entire mortgage has been discharged as a result of the sale of these 2 acres 63 cents, it is not adviseable for me to say anything further in the absence of the mortgagee; nor is it advisable to say anything further about the contribution which the auction-purchaser may seek to levy against the other properties included in the mortgage.

The appeal is accordingly dismissed, but without costs. No leave.

V.M.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. VENKATARAMAN.

A. S. Vethamurthy Mudaliar .. *Appellant**

v.

Saroja Ammal .. *Respondent.*

Hindu Marriage Act (XXV of 1955), *section* 23—*Scope—Allegation of adultery—Respondent submitting to the decree for judicial separation without contest—Petition for divorce—Proof of adultery, if could be insisted upon.*

It is true that in view of section 23 of the Hindu Marriage Act a decree for divorce or judicial separation should not be lightly granted because it is a matter concerning the public also in the last resort. But this only means that the succeeding Judge before whom the petition for divorce comes up is entitled to demand that proof should be offered to his satisfaction of the adultery which was the ground for the decree for judicial separation, particularly in a case like the present where in the prior petition the contest was given up at the time of the trial. But this does not mean that the petition for divorce should be dismissed without further

*A.A.A.O.No. 141 of 1966. 9th August, 1968.

more. What the succeeding Judge should do in such a case is to allow the husband an opportunity to prove the allegation of adultery on which judicial separation was prayed for and obtained and, of course, the wife would be entitled to defend herself in such an enquiry. The previous decree for judicial separation can on no account be considered a nullity. The Subordinate Judge who made that order had jurisdiction to enquire into the petition for judicial separation and to pass an order for judicial separation. It must be presumed that he was satisfied that an order for judicial separation could be made. Till that order was set aside in appeal, it could not be considered as of no effect. The only consequence of section 23 of the Act and the fact that now the Court is asked to put an end once for all to the matrimonial tie is that the Judge in the later petition for divorce can insist on proof to his satisfaction of the ground of adultery. But, if such proof is forthcoming, it will mean that in his opinion the original decree for judicial separation was also justified and could, therefore, be made the basis for the decree for divorce.

Appeal against the order of the District Court of Chingleput dated 15th April, 1966 and made in C.M.A. No. 14 of 1966 against the order of the Court of the Subordinate Judge of Chingleput dated 21st September, 1965 and made in O.P. No. 112 of 1964.

K. Ramaswamy, P. Ramaswamy, and *A. Sarojini Bai,* for Appellant.

R. Kallappan and *G. Desappan,* for Respondent.

The Court delivered the following

JUDGMENT :—This appeal arises out of the petition (O.P. No. 112 of 1964) filed by the appellant in the Court of the Subordinate Judge of Chingleput, under section 13 (1) (*viii*) of the Hindu Marriage Act, 1955, as it stood then, for a decree of divorce. Previously on 30th March, 1962 the Subordinate Judge's Court had passed an order in favour of the husband granting judicial separation on the ground of adultery of the wife. The husband alleged that for the space of two years or upwards after the passing of that decree they had not resumed cohabitation. Section 13 (1) (*viii*) of the Act as it stood enabled him to obtain a decree for divorce on that ground.

The wife resisted the petition on the ground that the previous order of 30th March, 1962 was not passed after due enquiry and was practically an order of consent and that it was consequently void (according to her) and should not be made the foundation of a decree for divorce.

The learned Subordinate Judge who tried the petition held that the order passed by the previous Subordinate Judge granting judicial separation was a proper order and was not a nullity and in that view he granted a decree for divorce.

The wife preferred an appeal. The learned District Judge took the view that there was no enquiry by the learned Subordinate Judge on the prior occasion and that consequently that decree for judicial separation was a nullity and should not be made the foundation for a decree for divorce. He thought, under the circumstances, that the petition of the husband for divorce had to be dismissed without further more. Hence this further appeal.

Before proceeding further it is necessary to narrate the circumstances under which the prior order of 30th March, 1962 in O.P.No. 47 of 1960 came to be passed. The parties had been married in 1946, being previously cousins. A daughter was born to them. The husband's work took him away for camp, but he happened to return earlier than originally planned. That was on the night of 10th April, 1959 about 10 P.M. To his shock and shame, he found his wife in the act of sexual union with the servant, George. It was on that ground that the husband filed the prior petition praying for divorce or at least for judicial separation. The wife resisted it. She denied the allegation. At the enquiry on 23rd March, 1962 the husband started his evidence and deposed as follows :—

"George was aged about seventeen years. My wife's aged aunt was in the house. She was aged eighty years."

At that stage the wife through her Counsel filed an affidavit to the following effect:

"The respondent does not want an investigation by the Court of the allegations made in the petition against the respondent. As it will not be possible hereafter for her and the petitioner to live together, there may be a decree for judicial separation. The question of custody of the minor daugher, whether it should be with her or with petitioner may be left open to be decided in separate proceedings."

The enquiry was stopped and the learned Subordinate Judge passed the following Order:—

"Petitioner agrees for judicial separation and both agree to have the question of custody of child left open for separate proceedings."

"It is clear that parties cannot get on together hereafter. If the case goes on and divorce is granted it will permanently separate them. If judicial separation alone is passed, there is a chance of their getting together and the child will have the benefit of living with both parents. There are enough allegations to pass a decree for judicial separation. This is seen from both the petition and the reply statement. In the circumstances of this case, no further evidence is necessary. I find that there are enough grounds to pass a decree for judicial separation and a decree is accordingly passed."

The point made by the learned District Judge in the order under appeal is that under section 23 of the Act, before the Court could grant the relief of judicial separation, it should be satisfied that grounds for granting the relief existed, that the husband-petitioner was not in any way taking advantage of his own wrong and was not colluding with the wife and had not condoned the act complained of and that there was no unnecessary delay. The learned District Judge points out that the mere fact that the wife did not want any further enquiry was not sufficient to afford satisfaction to the Court and that it was the duty of the Cou t to have made an independent enquiry to satisfy itself about the existence of the grounds for judicial separation. The learned District Judge thinks that there was no such independent enquiry and that consequently the decree for judicial separation was void. The learned District Judge quotes passages from the well-known work of Rayden on Divorce and also from Mulla's Hindu Law and Raghavachari's Hindu Law.

Now it is true that in view of section 23 of the Act a decree for divorce or judicial separation should not be lightly granted because it is a matter concerning the public also in the last resort. But this only means that the succeeding Judge before whom the petition for divorce comes up is entitled to demand that proof should be offered to his satisfaction of the adultery which was the ground for the decree for judicial separation, particularly in a case like the present where in the prior petition the contest was given up at the time of the trial. But this does not mean that the petition for divorce should be dismissed without further more. What the succeeding Judge hould do in such a case is to allow the husband an opportunity to prove the allegation of adultery on which judicial separation was prayed for and obtained and, of course, the wife would be entitled to defend herself in such an enquiry. The previous decree for judicial separation can on no account be considered a nullity. The Subordinate Judge who made that order had jurisdiction to enquire into the petition for judicial separation and to pass an order for judicial separation. It must be presumed that he was satisfied that an order for judicial separation could be made. Till that order was set aside, in appeal, it could not be considered as of no effect. The only consequence of section 23 of the Act and the fact that now the Court is asked to put an end once for all to the matrimonial tie is that the Judge in the later petition for divorce can insist on proof to his satisfaction of the ground of adultery. But, if such proof is forthcoming, it will mean that in his opinion the original decree for judicial separation was also justified and could, therefore, be made the basis for the decree for divorce.

I shall now refer to some of the numerous cases which have been cited before me. I may state at once that there seems to be no decided case directly in point covering the facts similar to the present case. But it seems to me that what I have stated above is what emerges as the correct course to be adopted as a result of the principles laid down in the decided cases. It need hardly be stated that there is nothing in the decided cases to invalidate the course which I have indicated.

It is enough to start with the statement of the law in *Thompson* v. *Thompson*[1]. There the wife had previously failed to obtain maintenance and in a later petition for divorce brought by the husband the question was whether she could once again traverse the same ground which she had unsuccessfully adduced before. Denning L.J. observed:

"There is no doubt, to my mind, that if the doctrine of *res judicata* applies in its full force to the Divorce Division of the High Court, the wife is so estopped. The issue of cruelty has already been the subject of litigation by a Court of competent jurisdiction, to wit, the Court which tried the wife's claim for maintenance and the Court would not, according to the ordinary principles, permit her to open the same subject of litigation again: see *Hoystead* v. *Commissioner of Taxation*[2]. The question in this case is, however, whether those ordinary principles do apply to the Divorce Division. The answer is, I think, that they do apply, but subject to the important qualification that it is the statutory duty of the divorce Court to inquire into the truth of a petition and of any countercharge—which is properly before it, and no doctrine of estoppel by *res judicata* can abrogate that duty of the Court. The situation has been neatly summarised by saying that in the divorce Court estoppels bind the parties but do not bind the 'Court': but this is perhaps a little too abbreviated. The full proposition is that, once an issue of a matrimonial offence has been litigated between the parties and decided by a competent Court, neither party can claim as of right to reopen the issue and litigate it all over again if the other party objects (that is what is meant by saying that estoppels bind the parties): but the divorce Court has the right, and indeed the duty in a proper case, to reopen the issue, or to allow either party to reopen it, despite the objection of the other party (that is what is meant by saying that estoppels do not bind the Court). Whether the divorce Court should reopen the issue depends on the circumstances. If the Court is satisfied that there has already been a full and proper inquiry in the previous litigation, it will often hold that it is not necessary to hold another inquiry all over again; but if the Court is not so satisfied, it has a right and a duty to inquire into it afresh. If the Court does decide to reopen the matter, then there is no longer any estoppel on either party. Each can go into the matter afresh."

The learned Judge then observes:

"The cases fall into three categories. The first category consists of those cases where a charge of a matrimonial offence has been established in previous proceedings. One party has been found guilty. In such a case, as between the parties, the strict rules of *res judicata* would seem to apply: but the divorce Court, being bound by no estoppels, often allows a departure from them. The best illustration is where a party has obtained a decree of judicial separation on the ground of cruelty and follows it up with a petition for divorce on the same ground. In the subsequent divorce proceedings the Court may treat the prior decree as sufficient proof of the cruelty; but it is not bound to do so. The Court can, if it thinks fit, inquire into charge of cruelty all over again. It will admit the prior decision as evidence of the cruelty, but not as conclusive."

This passage applies to the present case. The observations made by Hodson, L.J., and Morris, L.J., may, for our purposes, be considered to be similar.

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1. (1957) 2 W.L.R. 138 : (1957) Probate 19 : (1957) 1 All E.R. 161.

2. L.R. (1926) A.C. 155, 170 : 42 T.L.R. 207.

The above decision was followed in *Warren* v. *Warren*[1], and also in *Thody* v. *Thody*[2].

The matter is also discussed in Rayden on Divorce (Tenth edition, 1967) in Chapter Five, paragraphs 29 (Estoppel: cause of action estoppel: issue estoppel), 30 (*Res judicata*), and 31 (No estoppel binds the Court.)

As a result of the application of the above principles to this case, it must be held that no objection can be taken to the learned District Judge requiring to be satisfied himself about the truth of the allegation of adultery which was the basis for the decree for judicial separation, but he could not straightaway dismiss the petition on the ground that the previous order for judicial separation was a nullity.

Under the circumstances I set aside the order of the learned District Judge dismissing the petition of the husband, and remand the appeal to him for fresh disposal according to law and in the light of the observations contained in this judgment. It is open to the learned District Judge to make such enquiry as to satisfy himself that the adultery was true and that the original order for judicial separation was rightly passed. The husband must be given an opportunity to prove the allegation and the wife must similarly be given an opportunity to defend herself. The parties will bear their own costs in this appeal. Leave granted.

V.M.K. ——— *Appeal allowed; matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

P. Subbiah Iyer and another .. *Appellants**

v.

Pichiah Pillai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), *sections* 60, 51 *and* 63-A—*Othi giving absolute right to mortgagee if not redeemed within 7 years—If a clog on equity of redemption—Suit for redemption against transferee from mortgagee—Period of limitation—Starting point—Burden of proof—Claim for improvements by transferee—If governed by section* 51 *or* 63-A.

Limitation Act (IX of 1908), *Article* 134—*Suit for redemption against transferee from mortgagee—Article* 134 *when attracted.*

A clause in an othi giving the mortgagee absolute title to the mortgaged property if the mortgager failed to redeem it within a period of 7 years, would be a clog on the equity of redemption. (Point conceded).

A suit for redemption of an othi against the alienee from the mortgagee would be governed by Article 134 of the Limitation Act, 1908, only if the vendor purported to sell the property as his absolute property and the vendee purported to purchase it as such. The period of limitation begins to run from the date when the absolute transfer in favour of the alienee became known to the plaintiff. The burden of proving that the suit is within time is on the plaintiff. But the burden is a shifting one and it is sufficient for the plaintiff to show a *prima facie* case that the cause of action is not barred by limitation. However, when the parties have adduced evidence, the case has to be decided on evidence and not merely on the burden of proof.

In such a suit governed by Article 134 of Limitation Act a claim by the transferee for improvements effected by him believing in good faith that he was absolutely entitled to the property, falls under section 51 and not under section 63-A of T. P. Act and there is nothing in principle to deprive him of the benefit of section 51.

1. (1962) 1 W.L.R. 1310 : (1962) 3 All E.R. 1031.

2. (1964) Probate 181 at 188, 189 etc: (1964) 1 All E.R. 341 : (1964) 2 W.L.R. 371.

*S.A. No. 306 of 1964. 20th August, 1968.

Appeal against the decree of the District Court, Tirunelveli in A.S. No. 36 of 1962 preferred against the decree of the Sub-Court, Tirunelveli in O.S. No. 81 of 1960.

K. Raja Ayyar and *T. R. Mani*, for Appellants.

T. R. Ramachandran, N. Varadarajan, M. S. Dhanukodia Pillai, S. Ramalingam and *V. Shanmugham*, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J.—Appellants filed O.S. No. 81 of 1960, on the file of the Sub-Court, Tirunelveli, to redeem the othi, Exhibit B-1 dated 1st March, 1919 executed by Pichu Iyer in favour of Sitarama Iyer for Rs. 7,500. Pichu Iyer died in January, 1929. The first plaintiff Subbiah Iyer is the last son of Pichu Iyer. Defendants 4 and 5 are the sons of Sangu Iyer and Krishna Iyer respectively, the second and third sons of the said Pichu Iyer. Pichandi Iyer, the eldest son of Pichu Iyer, predeceased his father leaving two sons, Sivaramakrishna Iyer and the second plaintiff Sundaresa Iyer. Sivaramakrishna Iyer died leaving his widow Akilandammal, the sixth defendant in the suit. The plaintiffs and defendants 4 to 6 claim that they are entitled to redeem the suit mortgage as the successors-in-interest of the mortgagor Pichu Iyer. Defendants 1 to 3 claim to be absolute owners of the hypotheca by virtue of the clause in the othi deed Exhibit-B-1 under which the mortgagee Sitarama Iyer became absolutely entitled to the hypotheca after the expiry of a period of seven years and also by virtue of an oral sale of the hypotheca by Pichu Iyer to Sitarama Iyer and the successive alienations by which they ultimately got title. The contesting defendants 1 to 3 claimed to have become owners of the hypotheca by limitation and adverse possession and alternatively claimed a sum of Rs. 4,500 spent by them for effecting improvements to the hypotheca. The appellants-plaintiffs claimed relief under Madras Act IV of 1938.

Both the Courts below found that the clause in the othi deed, Exhibit B-1, giving the mortgagee absolute title to the hypotheca on the expiry of the period of redemption of seven years is a clog on the equity of redemption. But they, however, found that the suit was barred by limitation under Article 134 of the Limitation Act of 1908 and on account of adverse possession. Both the Courts below found that the first defendant had effected improvements to the value of Rs. 4,500 and observed that if the suit for redemption had been decreed, the plaintiffs would have to pay the said amount. They also found that the plaintiffs are not entitled to relief under Madras Act IV of 1938.

There can be no doubt in this case that the clause in Exhibit B-1 that the mortgagee shall enjoy the hypotheca as absolute owner with full power of alienation if it is not redeemed within a period of seven years is a clog on the equity of redemption and in fact, the learned advocate for the contesting respondents did not dispute the same.

The first question for consideration in this appeal is whether there was an oral sale of the hypotheca by Pichu Iyer in favour of Sitarama Iyer on 1st March, 1926. If there is pleading and evidence about this oral sale, there would be no justification for interfering with the concurrent finding of the Courts below that Sitarama Iyer became absolutely entitled to the hypotheca. But there is no plea in the written statement of the first defendant that there was an oral sale by Pichu Iyer in favour of Sitarama Iyer. In paragraph 4 of the written statement of the first defendant it is stated that Sitarama Iyer became absolute owner of the properties since 1st March, 1926 as per the stipulation in the deed. The first defendant has submitted in that paragraph that Pichu Iyer agreed to and accepted the absolute ownership of Sitarama Iyer and had the patta transferred to his name after 1st March, 1926 and hence the right of redemption if any, has been extinguished by act of parties and the possession of Sitarama Iyer since that date was converted into possession as absolute owner.

(After discussing the evidence His Lordship proceeded:)

There is practically no evidence to support the oral sale which has not even been pleaded in the written statement, or the arrangement mentioned in paragraph 4 of the written statement of the first defendant. In fact, the Courts below have not dealt with the arrangement pleaded in paragraph 4 of the written statement independently, but only as evidence of the oral sale put forward during the trial of the case. Even the arrangement pleaded in paragraph 4 of the written statement of the first defendant is really based on the invalid stipulation in the deed Exhibit B-1, giving absolute title to the mortgagee after the expiry of the period of redemption. The learned advocate for the contesting respondents relied on the arrangement pleaded in paragraph 4 of the written statement of the first defendant only in support of his contention that adverse possession commenced even from 1st March, 1926. It is true that if there was an arrangement between Pichu Iyer and Sitarama Iyer as pleaded in paragraph 4 of the written statement of the first defendant, the subsequent possession of Sitarama Iyer and his successors-in-interest would be adverse to Pitchu Iyer and his successor-in-interest. The decision in *Kandaswami* v. *Ponnuswami*[1], would clearly support such a contention. In *Padma Vitoba* v. *Md. Multani*[2], it was held that if the mortgagor and mortgagee subsequently entered into a transaction under which the mortgagee is to hold the properties thereafter not as a mortgagee, but as owner, that would be sufficient to start adverse possession against the mortgager if the transaction is for any reason inoperative under the law. But in this case even the finding of the lower appellate Court is that the pleadings and the evidence do not clearly bear out the oral agreement of sale between Pichu Iyer and Sitarama Iyer in or about 1926. In fact, the learned District Judge has relied only on the conduct of the parties in dealing with the hypotheca subsequent to 1926 as showing that Sitarama Iyer and his successors-in-interest enjoyed the suit properties with patta in their names as owners and not as mortgagees. The transfer of patta was not in pursuance of the oral sale but only by virtue of the terms of Exhibit B-1. We have shown how the conduct of Sitarama Iyer and his successors-in-interest in executing absolute conveyance is consistent with the invalid stipulation in Exhibit B-1 and cannot be relied on as unequivocally showing that the said conduct was a result of the oral sale put forward by the contesting defendants during the trial, or the arrangement mentioned in paragraph 4 of the written statement of the first defendant. Thus, we are unable to accept the case of the contesting defendants as regard the oral sale for which there is no plea, or the oral arrangement for which there is really no evidence.

The next question for consideration in this appeal is whether the suit claim is barred by limitation. On the pleadings, there can be no doubt that the claim falls under Article 134 of the Limitation Act 1908. The plaintiffs came to know from the reply notice sent by defendants 1 to 3 that they were claiming absolute title to the properties covered by Exhibit B-1. In *Vythilinga Pillai v. Kuthiravattah Nair*[3], it has been held that Article 134, Schedule I of the Limitation Act applies only to cases where the vendor purports to sell the property as his absolute property and the vendee purchases it as such. The plaintiff in that suit sued for redemption of certain lands. It was held that Article 134 of the Limitation Act could not be invoked by defendants 2 and 3 in that case, as they failed to show that what they acquired was absolute property or what is known in the English law as fee-simple title and not merely the interests of the first defendant mortgagee. In *Nani Bai v. Gita Bai*[4], it has been held that in order to attract the operation of Article 134 of the Limitation Act of 1908 the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage and if there is no such proof, the shorter period under Article 134 is not available to the defendant in a suit for possession after redemption. It should be noted that the defendant in that case had failed to produce and prove the sale deed in her favour

1. A.I.R. 1929 Mad. 16.
2. (1963) 2 S.C.J. 172 : (1963) 3 S.C.R. 289 : A.I.R. 1963 S.C. 70 at 73.
3. (1906) I.L.R. 29 Mad. 501 : 16 M.L.J. 358.
4. (1958) S.C.J. 925 : (1959) S.C.R. 479 : A.I.R. 1958 S.C. 706.

and it has, therefore, been held that the defendant cannot invoke the shorter period of limitation under Article 134 of the Limitation Act as against Article 148. The Supreme Court did not go into the further contention of the plaintiff in that suit that it is for the defendant to plead and prove the facts, including the date of knowledge, which would attract the bar of limitation under Article 134 Schedule I of the Limitation Act of 1908. In *Venkatasubbiah* v. *Jamma Mosque*[1], it has been held that where the vendor not in possession of a full title, such as a mortgagee under a mortgage by conditional sale, purports to convey an absolute title, the transaction constitutes a transfer within the meaning of Article 134 of the Limitation Act. Having regard to the averments in the plaint in this case, there can be no doubt that the case clearly falls under Article 134, Schedule I of the Limitation Act of 1908.

The further question to be considered in this case is when the absolute transfer in favour of the contesting defendants became known to the plaintiffs, as the period of limitation begins to run from such time. In paragraph 9 of the plaint, it is stated that the first plaintiff went to Aladiyoor village on 1st October 1948 and learnt about the possession of defendants 1 and 2 and that it was only on 30th October, 1948, when the plaintiff's lawyer received the reply notice dated 29th October, 1948, the plaintiffs and defendants 4 and 5 came to know of the claim of defendants 1 and 2 for the so-called absolute title to the suit properties. The relevant plea of the first defendant in his written statement, which has been adopted by defendants 2 and 3, is contained in paragraph 9. It is stated in that paragraph that it is false to state tnat the first plaintiff came to know of the possession of the first defendant only on 1st October, 1948 when he happened to go to Aladiyoor village. It is pleaded that the plaintiffs are fully aware of the possession of the first defendant and his predecessors-in-title as well as others from the dates of the respective transfers. In paragraph 14 of the plaint it is stated the cause of action arose on 30th April, 1948 when the plaintiffs received the reply notice containing the claim of defendants 1 and 2 to an absolute title to the suit properties. There is only a general denial of this plea in the written statement of the first defendant. There is no plea that the cause of action arose earlier on the date of the alleged oral sale or arrangement, or subsequently at any time beyond 12 years prior to suit.

We have pointed out that on the averments contained in the plaint the case is governed by Article 134 of Schedule I of the Limitation Act of 1908. The learned Advocate for contesting respondents relied on the decisions in *Raghunanda* v. *Mahadeo*[2], and in *Khadi Khan* v. *Murad Khan*[3], in support of his contention that in such cases as the present one the burden is on the plaintiff to show that the suit is within time by showing that he came to know of the transfer in favour of the contesting first defendant within 12 years of the date of suit. The decision is based on two principles, namely, that it is the duty of the plaintiff to prove that his case is within limitation and that a fact which is within the special knowledge of a person has to be proved by that person. In construing similar provisions in Article 48 of Schedule I of the Limitation Act, of 1908, a Bench of the Calcutta High Court in *Kalyani Prasad Singh* v. *Borrea Coal Co.*[4] and the Supreme Court in *Nanji & Co.* v. *Jatashankar Dossa*[5], have adopted the same principles and found that the burden of proof is on the plaintiff to prove that he had knowledge of the conversion of his movable property within 3 years prior to suit. But it has been pointed out in those decisions that the burden is a shifting one and that it is sufficient for the plaintiff to show a *prima facie* case that the cause of action is not barred by limitation. But the parties have adduced evidence in this case and the case has to be decided on evidence and not merely on the burden of proof.

[After discussing the evidence His Lordship said:]

If we act on the evidence in this case and not on conjectures and surmises, there can be no doubt that the appellants plaintiffs came to know of the absolute

1. (1941) 1 M.L.J. 754 : A.I.R. 1941 Mad. 666.
2. A.I.R. 1933 Oudh 38.
3. A.I.R. 1942 Pesh. 39.
4. A.I.R. 1946 Cal. 123.
5. (1962) 1 S.C.R. 492 : A.I.R. 1961 S.C. 1474 at 1478.

title put forward by the first defendant only on receiving the reply notice and the suit is, therefore, clearly within time.

The only remaining question to be considered in this case is whether the appellants are bound to pay for the improvements effected by the contesting first respondent. Both the Courts below have found that the first defendant has effected improvements to the value of Rs. 4,500 and that in case the plaintiffs get a decree for redemption, they should not only pay the mortgage amount, but also the value of the improvements. Sri T. R. Mani appearing for the appellants contended that by virtue of section 72 (*b*) of the Transfer of Property Act, a mortgagee in possession may spend such money as is necessary only for the preservation of the mortgaged property from destruction, forfeiture or sale and that the claim of the appellants for improvements is directly governed by section 63-A of the Transfer of Property Act. In *Arunachala Chetti* v *Sithayi Ammal*[1] it has been held that section 72 (*b*) of the Transfer of Property Act does not permit a mortgagee in possession to effect improvements. In *Gopilal* v. *Abdul Hamid*[2], a decision prior to the amendment of 1929, it has been held that the claim of a mortgagee for improvements is governed by the specific provision contained in section 63 of the Transfer of Property Act and not by the general provision contained in section 51 of that Act. It is true a mortgagee as mortgagee cannot claim for the value of improvements under section 51 of the Transfer of Property Act as his claim would be governed by section 63-A. Sri T. R. Mani referred to section 59-A of the Transfer of Property Act and urged that unless otherwise expressly provided, reference in the Chapter on Mortgages to mortgagors and mortgagees shall be deemed to be references to persons deriving title from them respectively. A suit for redemption against a mortgagee in possession would fall under Article 148 of Schedule I of the Limitation Act of 1908. But a suit to recover possession of property which has been mortgaged but subsequently transfered by the mortgagee for valuable consideration is governed by Article 134 of Schedule I of the Limitation Act of 1908. Thus there is a distinction between a suit against mortgagee and the one against an absolute transferee from a mortgagee. The word ' mortgagee' would by virtue of section 59-A of the Transfer of Property Act include persons deriving title of the said mortgagee. Thus if a mortgagee transfers or assigns his mortgage right to another, the transferee would also be a mortgagee, whose claim for improvements would fall under section 63-A of the Transfer of Property Act. The claim of the first defendant in this case which is governed by Article 134 of the Limitation Act clearly falls within the terms of section 51 of the Transfer of Property Act and there is nothing on principle to deprive him of the benefits of that section. In *Ramkaur* v. *Pratap Singh*[3], the mortgagee was misled by a term of the mortgagee that after five years the transaction is to be treated as a sale and effected improvements. It was held in that case that " the mortgagee had a reasonable ground to entertain a *bona fide* belief that, after expiry of the period stipulated for redemption, there is no intention on the part of the mortgagor to redeem, and that he is, therefore, the owner of the property ". In this view, it was held equitable that the mortgagor while retaining the benefit of the improvement, should pay its cost at the time of redemption. In *Pandian Pillai* v. *Vellayappa Rowther*[4] there was a condition converting the mortgage into a sale and it was held to be a clog on the equity of redemption. But the mortgagee who was misled by the condition into believing himself to be an absolute owner, was allowed compensation for improvements under section 51 of the Transfer of Property Act. It is true this case has been distinguished in *Gopilal* v. *Abdul Hamid*[2], already referred to. But the facts of the present case are very much stronger for invoking section 51 of the Transfer of Property Act, Exhibit B-3, B-5, B-7 and B-9, are absolute transfers. Under Exhibit B-9, the first defendant claims to have got absolute title to the properties mortgaged under Exhibit B-1. It is true the absolute title claimed by the first defendant under Exhibit B-9 is defective. But it could not be said that he did not believe in good faith that he is absolutely entitled to the property purchased by him under that document. The requirements of section 51 are fully satisfied in this case.

1. (1896) I.L.R. 19 Mad. 327.
2. A.I.R. 1928 All. 381.
3. (1919) 51 I.C. 689.
4. 33 M.L.J. 316.

The claim of the first defendant for improvements under section 51 of the Transfer of Property Act cannot be defeated by stating that he is really a mortgagee as he could have got only the right, title and interest of the mortgagee under Exhbit B-1 and that his claim would be governed by section 63-A of the Transfer of Property Act. In our opinion, the first defendant is entitled to claim the value of improvements, namely, Rs. 4,500 by virtue of section 51 of the Transfer of Property Act.

Sri T.R. Mani did not challenge the findings of the Courts below that the plaintiffs are not entitled to claim any benefit of scaling down the debt due under the mortgage Exhibit B-1 by virtue of Madras Act IV of 1938.

In the result, the decrees and judgments of the Courts below dismissing the suit of the plaintiffs are set aside and the suit for redemption is decreed. But the appellants and respondents 4 and 5 should pay not only the mortgage amount, but also the value of the improvements, namely Rs. 4,500 fixed by the Courts below. The appellants are entitled to costs of this Court and of the lower appellate Court. The parties shall bear their respective costs in the trial Court as ordered by the Subordinate Judge, as this is a suit for redemption. Time for redemption six months.

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE M. NATESAN.

Sri Mottayan *alias* Ponnuswami .. *Appellant**

v.

Sri Thambuswami Padayachi and another .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Section* 9, *and Madras Cultivating Tenants Protection Act* (*XXV of* 1955)—*Civil Courts Jurisdiction when ousted.*

Constitution of India (1950) *Article* 213 (2) *and Evidence Act* (*I of* 1872) *sections* 57 *and* 58.

The Madras Cultivating Tenants Protection Act (*XXV of* 1955), *Section* 2 (aa) *and Ordinance I of* 1958—'*Cultivating Tenant*'—*Definition of—Government publication showing without amendment made by Ordinance—M.L.J. Publication showing substitutes made by Ordinance—Correctness of—Ordinance not followed up by Act of Legislature—Substituted definition, whether of permanent nature.*

The Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 2 (aa)—*Explanation—Scope of—Sub-lessees of Cultivating Tenants not entitled to protection.*

Once it is found that P.W. 4 is the Cultivating Tenant of the lands involved, the sub-lessees under him cannot claim any benefits under Act XXV of 1955 against the owner of the land. The Cultivating Tenant on sub-lease himself ceasing to cultivate, would also lose the protection of the Act. The civil Court's Jurisdiction to recover possession of the land in such circumstances, from the sub-tenants in actual possession is not taken away by the Act. The landlord can have eviction against all of them in the civil Court none of them being entitled to the benefits of the Act. To oust the jurisdiction of the civil Court in a suit in ejectment, three conditions must be satisfied, one, the occupant must be a cultivating tenant, two, he must be entitled to the benefits of Madras Act XXV of 1955 and three, there must be a possibility of his securing one or other of the reliefs open to a cultivating tenant, before the Revenue Court.

(On facts held, the requisites for ousting the jurisdiction of the Civil Courts are clearly wanting in the case).

If in law the amendment in the Act as carried out by the Ordinance stood notwithstanding the expiration of the Ordinance, the failure of the Government printer to show the amendment in a Government Publication of the Act will not

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*S.A. Nos. 1024 to 1026 of 1962. 10th October, 1968.

affect the currency of the amended text as a statutory provision. Laws, which under the Constitution, include Ordinance, have their sanction from the appropriate legislative authority making them and do not depend upon for their force and effectiveness on the Government Printer's texts of the law or the law secretariat's compilation of the law. It will no doubt be a new terror in the interpretation of law, if one has to grope for the authentic text of the law and in the process reject government publication. But that cannot be avoided when the position is clear, as the Government printer with his omissions or commissions cannot take the place of the Legislature and the laws officially gazetted. The Evidence Act does not make the production of a copy of the Act printed by the official printer or by order of Government conclusive of the correctness of the text of the Act printed—only a mode of proof is indicated.

The Government Publication shows a revivor of the definition of the Cultivating Tenants Protection Act without the amendment made by Ordinance I of 19 8. A private publication of Madras Acts published by the M.L.J. Press shows the definition of cultivating tenant as substituted by Ordinance I of 1958. The question is which version of the text is the correct one, which has statutory force. The latter would be correct, if the amendment carried out by the Ordinance enured beyond the life-time of the Ordinance. The former would be correct if the Ordinance merely suspended the original definition, and the amendment was as temporary in character as the Ordinance. This question has to be answered by the Court purely as an inference of law.

The Ordinance in question here came into force immediately on its promulgation and by section 2 substituted a new definition for cultivating tenant instead of the existing one. The purpose of the Ordinance was achieved the moment it was promulgated. Once the substitution was brought about by promulgation of the Ordinance, the subsequent currency of the Ordinance was unnecessary. The Ordinance spent itself immediately on its promulgation, and need not be operative thereafter even during the remaining period of six weeks to maintain the amendment. Its operation got exhausted by the accomplishment of the purpose for which it was passed. It may be that the legislative secretariat who originally introduced the Bill in terms of the Ordinance, providing for the repeal of the Ordinance thought that the whole procedure was unnecessary. Having regard to the character of the provisions of the Ordinance in relation to the amendment, it was held that, it is intended to be a permanent feature, and the amendment having been carried out in the parent Act, it would stand notwithstanding the expiry of the Ordinance in the usual course. The effect of the expiry of an Ordinance which has the force of a temporary Act must depend upon the nature of the provisions contained in the temporary Act—whether they have to be of an enduring character or not. The nature of the provision reveals that the intention of the legislature is to effect a permanent substitution in the Act, not just for the life of the Ordinance.

Whether the expiry of the temporary Act automatically revives the old provisions as temporarily repealed by the amendment, or by the substitution is purely a question of construction. There is nothing to suggest in the instant case whether the change in the definition whether looked upon as an amendment, or repeal and substitution was intended to be temporary only. On the amendment being carried out in the parent Act, to that extent the Ordinance ceased to be operative. No doubt the Ordinance as such expired later by efflux of time. It could well be said that a repeal of the Ordinance in the instant case would only be ex *abundanti cautela*. The Legislature could if it was so minded have by resolution disapproved the Ordinance or by an Act restored the original definition.

Held, The substitution of the definition of 'Cultivating Tenant' by Ordinance I of 1958 was intended to be continued in the statute book even after the expiry of the period of the Ordinance. It was not a temporary measure, suspending for the duration of the Ordinance, the original definition.

A person who becomes a cultivating tenant of the land does not cease to be so by losing the protection under the Act and subjecting himself to eviction in terms of the Act. The sub-tenancy referred to in the Explanation must be under a person who is himself not a 'cultivating tenant.' Though the word "tenant" standing by itself could include a cultivating tenant, it is obvious when in the *Explanation* in relation to the landlord the word used is tenant, the mere general term is used in a meaning excluding the specific relationship of a cultivating tenant.

Held on facts, that the appellants who are only sub-lessees of the cultivating tenant cannot claim to oust the jurisdiction of the Civil Court and seek the protection of the Cultivating Tenants Protection Act.

Appeals against the Decrees of the Subordinate Judge, Kumbakonam, dated 22nd December, 1961, in Appeal Suit Nos. 112, 111 and 113, of 1961, respectively, preferred against the decrees of the Court of the District Munsif of Kumbakonam dated 17th August, 1961 in Original Suit Nos. 103, 105 and 104 of 1961, respectively.

S. Seetharaman and *Rajaraman* for Appellants.

Vedanthachari and *A. Venkatesan* for Respondents.

The Court delivered the following

JUDGMENT.—These second appeals arising out of three connected suits raise an interesting and important question of law, to be specific, the question whether during the relevant period there has been a statute current as contended for the appellants.

The properties in the suits are agricultural lands and the suits are in ejectment and for future profits. The suit wet lands R.S. No. 407/4, thirty-three cents R.S. No. 403/1, eighty cents and R.S. Nos. 325/7 and 325/8 and 302/2 seventynine cents, situate in Kavalkoodam Village, Neelathanallur vattam, Thanjavur District, belonged to one Narayanaswami Pillai. According to the findings of the Courts below, he was cultivating his lands in Pannai till 11th November, 1952 when under Exhibit A-2, he leased the lands in the suits and other lands to one Varadaraja Padayachi, the first defendant in three suits under second appeal who was the Village Munsif of the vattam and who had been acting as the agent of Narayanaswami Pillai and collecting rents for him. The lease deed had been executed under the provisions of the Tanjore Tenants and Pannayal Protection Ordinance VI of 1952, which was later followed by Madras Act XIV of 1952. In the partition between Narayanaswami Pillai and his son Navaneetha Krishnan on 27th November, 1959, lands bearing R.S. No. 302/2, 325/7 and 325/8 among other properties fell to the share of Navaneetha Krishnan. Under Exhibit A-1 dated 5th April, 1960, Narayanaswami Pillai sold R.S. No. 407/4 to the plaintiff in O.S. No. 103 of 1961, out of which Second Appeal No. 1024 of 1962 arises. Under Exhibit A-5, dated 7th March, 1960, Narayanaswami Pillai sold R. S. No. 403/1 to Gopala Padayachi, the plaintiff in O.S. No. 104 of 1961 out of which Second Appeal No. 1026 of 1962 arises. Under Exhibit A-4 dated 27th January, 1960, the son Navaneetha Krishnan sold lands R.S. Nos. 235/7, 327/8 and 302/2 to Naina Padayachi, the plaintiff in O.S. No. 105 of 1961, out of which Second Appeal No. 1025 of 1962, arises. Varadaraja Padayachi who held the lands on lease from the owner Narayanaswami Pillai, arranged for these sales agreeing to surrender possession of the suit lands to the purchasers by 30th April, 1960. It is in evidence that he told the purchasers that Mottayyan, the second defendant in the suits O.S. Nos. 103 and 104 of 1961 was sub-lessee under him of the lands concerned therein, and Kuppu Samban the second defendant in O.S. No. 105 of 1961 was sub-lessee under him of the lands concerned in that suit. On failing to secure possession of the lands, as promised the purchasers filed eviction petitions under the Madras Cultivating Tenants Protection Act XXV of 1955, which had become applicable in the area, before the Revenue Court, Kumbakonam, charging Varadaraja Padayachi, the lessee under Exhibit A-2 and the first defendant in the present suits, with having sub-leased the lands. The sub-lessees under him were made parties to these petitions. The Revenue Court held that the sub-lessees from the lessee from the owner were not entitled to the benefits of Act XXV of 1955 and that the Plaintiff should seek their remedies in

the civil Court as actual possession was admittedly with them. In that view, the petitions for eviction were dismissed. It is in these circumstances that the purchasers have filed the three suits in ejectment out of which these second appeals arise. The lessee first defendant remained *ex parte* and submitting to eviction being ordered, gave evidence for the plaintiffs as P.W. 4. As P.W. 4, he stated in his deposition that subsequent to the lease in his favour under Exhibit A-2, about 4 or 5 years prior to his giving deposition, he sub-leased the lands. The two sub-lessees examined themselves as D.Ws., 1 and 2 and the purchasers as P.Ws. 1 to 3, evidence being recorded in common for all the suits. The substantial defence taken by the contesting defendants, the sub-tenants, is that the first defendant was only an intermediary and farmer of rent and not a cultivating tenant and that they are the cultivating tenants entitled to protection of Act XXV of 1955. The Courts below negatived the claims of D.Ws. 1 and 2 and decreed the suits in ejectment as prayed for. Objections raised by them as to the jurisdiction of the civil Court were overruled. The Appellate Court which posed before itself for consideration the question whether the first defendant in all the suits was only a farmer of rent and an intermediary and not a cultivating tenant and whether the sublessees under him who were admittedly in possession of the lands were cultivating tenants under the Act XXV of 1955 has decided the question against the sub-tenants. The Appellate Court records that by the overwhelming evidence of P.Ws. 1 to 4, Exhibit A-2 and even by the evidence of D.Ws. 1, 2 and 3, P.W. 4 was proved to be the cultivating tenant under Narayanaswami Pillai.

The question whether P.W. 4 held lands under Narayanaswami Pillai as a cultivating tenant or was only a farmer of rent and collects rents as an agent of Narayanaswami Pillai is primarily a question of fact and has been decided in favour of the plaintiffs. The Courts below have not accepted the case of the sub-tenants that they were on the land long prior to the lease in favour of P.W. 4. The Courts below refer to the fact that the lands were under pannai cultivation of Narayanaswami Pillai prior to the lease, and P.W. 4 had subsequent to the lease in his favour inducted the subtenants on the land. The Appellate Court remarks that if P .W.4 had claimed to be a lessee for the first time after the coming into force of Act XXV of 1955 then it might be possibly contended that he not having cultivated the land himself would not be a cultivating tenant as the sub-tenants were admitted to be actually tilling the soil for about 5 to 6 years prior to the trial. There is no doubt evidence, that P.W. 4 took large extents of land on lease but it may be that with reference to these small extents, the subject-matter of consideration in these suits, he was an actual cultivator.

The lease deed Exhibit A-2, it is pointed out by the lower Appellate Court was executed by P.W. 4 under the provisions of Tanjore Tenants Protection Ordinance VI of 1952

The Courts below have given a finding that P.W. 4 was not an intermediary but a cultivating tenant. The Madras Cultivating Tenants Protection Act XXV of 1955 which was published in the Fort St. George Gazette on 27th September, 1955 did not initially apply to the areas covered by the Tanjore Tenants and Pannayals Protection Act. It is only by Madras Act XIV of 1956 published in the Fort St. George Gazette on 1st October, 1956 that Madras Act XXV of 1955 was extended to the territories covered by Madras Act XIV of 1952.

The definition of the term cultivating tenant in the Tanjore Tenants and Pannayals Act XIV of 1952, as the definition in Act XXV of 1955 required of the cultivating tenant contribution of his own physical labour or that of the members of his family in the cultivation of the land. Once it is found that P.W. 4 is the cultivating tenant of the lands involved, the sub-lessees under him cannot claim any benefits under Act XXV of 1955 against the owner of the land. See *Ganapathi Aiyar* v. *Ayyakannu*[1], The cultivating tenant on sub-lease himself ceasing to cultivate, would also lose the protection of the Act. The Civil Court's Jurisdiction to recover possession of the land in such circumstances from the sub-tenants in actual possession

1. (1961) 1 M.L.J. 217: I.L.R. (1961) Mad. 452: (1921) 74 L.W. 114.

is not taken away by the Act. The landlord can have eviction against all of them in the civil Court, none of them being entitled to the benefits of the Act. To oust the jurisdiction of the civil Court in a suit in ejectment, three conditions must be satisfied, one, the occupant must be a cultivating tenant, two he must be entitled to the benefits of Madras Act XXV of 1955, and three there must be a possibility of his securing one or other of the reliefs open to a cultivating tenant, before the Revenue Court. The requisites for ousting the jurisdiction of the civil Courts are clearly wanting in the case. P.W. 4 does not claim any protection under the Act. He had promised to surrender possession to the plaintiffs with the end of the agricultural year and so he stands *ex parte* in the suits and supports the plaintiffs as P.W. 4.

Learned Counsel for the appellants would question the correctness of the decree even if the finding that P.W. 4 is the cultivating tenant of the lands and that he is not a mere intermediary or farmer of rent, cannot be chellenged in second appeal. He submits that notwithstanding these findings, D.Ws. 1 and 2 can resist the actions for ejectment under the very definition of a "Cultivating Tenant" under Madras Act XXV of 1955. Learned Counsel reads from the Civil Court Manual—Madras Act—Volume II, 7th Edition 1967, published by the M.L.J., the *Explanation* given in the definition of "Cultivating Tenant" in relation to any land. The definition therein given runs thus:

"Section 2 (*aa*) 'Cultivating Tenant' in relation to any land—

1. means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and

2. includes—

(*i*) any such person as is referred in sub-clause (1) who continues in possession of the land after the determination of the tenancy agreement,

(*ii*) in the District of Tiruchirapalli, a kaiaeruvaramdar or a mattuvaramdar who works on the land under an engagement with the landlord for remuneration by a share in the crop in respect of which the work is done, and

(*iii*) the heirs of any such person as is referred to in sub-clause (1) or sub-clause (2) (*i*) and (*ii*), but does not include a mere intermediary or his heirs.

Explanation.—A sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such sub-tenant has ceased to be the tenant of such landlord."

The foot note shows that the definition is as a result of amendment by Madras Ordinance I of 1958.

Counsel for the appellants stresses on the *Explanation* which provides that a *sub-tenant* shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such sub-tenant has ceased to be a tenant of such landlord. Resting his argument on the *Explanation*, it is submitted that as admittedly according to the plaintiffs in the suit, P.W. 4 has ceased to cultivate the land himself, the sub-tenants under him must be deemed to be 'cultivating tenants' under the respective landlords. Before examining the applicability of the *Explanation* to the facts of these cases, I have first to solve the problem whether at all this *Explanation* could be read in the definition of a cultivating tenant and whether this *Explanation* has been current as part of the Act during the relevant period and is available to the appellants. Learned Counsel for the plaintiff-landlords questions the correctness of the definition relied on for the appellants and refers me to a publication by the Law Department of the Government of Madras, Revenue Acts and Regulations, corrected upto the 31st December, 1966, which contains the Madras Cultivating Tenants Protection Act, 1955. It is printed in 1968 and stated to be prescribed for the Revenue Tests of the Special Test Examination of the Government of Madras. The definition of Cultivating Tenant as found in this Government Publication runs thus:

"2 (aa) 'Cultivating Tenant' in relation to any land means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and includes—

(i) any such person who continues in possession of the land after the determination of the tenancy agreement; and

(ii) the heirs of such person, but does not include a mere intermediary or his heirs."

With reference to this definition all that is found in the foot note in this publication is that this clause was relettered as (aa) by section 3 (i) of the Madras Cultivating Tenants Protection and Payment of Fair rent (Extension to added territories) Act, (XXXIII of 1963). No amendment of the text of this definition of cultivating tenant is indicated in this publication. The problem is which is the text of the definition that has to be followed. The M.L.J. Manual points that the Act XXV of 1955 was amended by Ordinance I of 1958, Act XIX of 1958, Act XXXII of 1961, Act XXXIII of 1963 and Act VIII of 1965. Now to go to Ordinance No. I of 1958, this is an ordinance promulgaged by the Governor of Madras on 5th January, 1958, and published in the Gazette on 6th January, 1958. It is headed "An Ordinance further to amend the Madras Cultivating Tenants Protection Act, 1955, and the Madras Cultivating Tenants (Payment of Fair Rent) Act, 1956". The relevant part of the Ordinance reads:

"Whereas the Legislature of the State is not in session and the Governor of Madras is satisfied that circumstances exist which render it necessary for him to take immediate action:

And whereas the instructions of the President have been obtained in pursuance of the proviso to clause (1) of Article 213 of the Constitution:

Now, therefore, in exercise of the powers conferred by clause (1) of Article 213 of the Constitution, the Governor hereby promulgates the following Ordinance:

1. *Short title and commencement.*—(1) This Ordinance may be called the Madras Cultivating Tenants Protection and Payment of Fair Rent (Amendment) Ordinance, 1958.

(2) It shall come into force at once.

2. *Amendment of section 2 of Madras Act XXV of* 1955.—In the Madras Cultivating Tenants Protection Act, 1955 (Madras Act XXV of 1955), for clause (a) of section 2, the following clause shall be substituted, namely:—

(a) 'Cultivating tenant' in relation to any land—

(1) means a person who carries on personal cultivation on such land, under a tenancy agreement, express or implied, and

(2) includes—

(i) any such person as is referred to in sub-clause (1) who continues in possession of the land after the determination of the tenancy agreement,

(ii) in the District of Tiruchirapalli, a kaiaeruvaramdar or a mattuvaramdar who works on the land under an engagement with the landlord for remuneration by a share in the crop in respect of which the work is done, and

(iii) the heirs of any such person as is referred to in sub-clause (i) or sub-clause (2) (i) and (ii) but does not include a mere intermediary or his heirs.

Explanation.—A sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such sub-tenant has ceased to be the tenant of such landlord."

It will be seen that the text of the definition found in the M.L.J. Manual is the definition in terms of the Ordinance No. I of 1958. It is an admitted fact that the Ordinance was not replaced by an Act with reference to this definition. Learned Counsel for the respondents submits that as the Ordinance has not been followed up by any Act of the Legislature under Article 213 of the Constitution, it ceased to operate on the expiration of six weeks from the re-assembly of the State Legislature, and that quite properly the Government publication has retained the old un-amended definition. It is not denied as it cannot be, that during the period of its life, the Ordinance had the same force and effect as an Act of the Legislature of the State assented to by the Governor. Article 213 (2) provides so. Under Article 213 the power of the Governor to legislate by Ordinance is co-extensive with the power of the Legislature of the State, except that an Ordinance can be only of the limited duration. As what can be achieved by means of a regular legislation through the Legislature, can when the Legislature is not in session also be achieved by an Ordinance duly promulgated, it is manifest that an Act of the Legislature can be repealed or amended by an Ordinance. *See* observations of Harris, C.J., in *Jnan Prosanna* v. *Province of West Bengal*[1]. What the learned Counsel for the respondents submits is that an amendment of an Act by an Ordinance whether by addition or by substitution can have validity only during the subsistence of the Ordinance and when the Ordinance ceased to have force, and expired by efflux of its period, the amendment went out of the statute with it. Learned Counsel drew my attention to the fact that a Bill to replace the Ordinance in its terms was introduced on the re-assembly of the Legislature but that Bill did not become law. There was a clause in that Bill providing also for repeal of the Ordinance. So far as the Kaiaeruvaramdar and Mattuvaramdar of the Tiruchirapalli District are concerned, a comprehensive Act—Act XXXVI of 1958 was passed. It is urged on this, that the Legislature did not intend to make the amendment a feature of the Act, and only allowed it to run its course. It is not contended that there was a dis-approval of the Ordinance by the Legislature.

As I see it, if in law the amendment in the Act as carried out by the Ordinance stood notwithstanding the expiration of the Ordinance, the failure of the Government printer to show the amendment in a Government publication of the Act will not affect the currency of the amended text as a statutory provision. Laws, which under the Constitution, include Ordinance—*See* Article 367 (2)—have their sanction from the appropriate legislative authority making them and do not depend upon for their force and effectiveness on the Government Printers texts of the law or the law Secretariat's compilation of the law. No statutory rule that any Government Edition of a statutory law has to be regarded as the sole repository of the correct text of law has been placed before me by Counsel, as for instance the conclusive proof provided in section 7 (*a*) of the Madras General Clauses Act on publication in the Official Gazette of a Rule that the rule has been duly made. It will no doubt be a new terror in the interpretation of law, if one has to grope for the authentic text of the law and in the process reject Government Publication. But that cannot be avoided when the position is clear, as the Government printer with his omissions or commissions cannot take the place of the Legislature and the Laws officially gazetted.

Section 57 of the Evidence Act provides that the Court shall take judicial notice of all laws in force in the territory of India. The section provides that the Court may resort for its aid to appropriate books or documents of reference. Section 78 of the Evidence Act states that the following documents may be proved as follows :

> " (1) Acts, orders or notifications of the Central Government in any of its Departments or the ' Crown Representative ' or of any (State) Government or any Department of any (State) Government—

by the records of the Department certified by the Heads of those Departments respectively,

1. A.I.R. 1949 Cal 1 (F.B).

or by any document purporting to be printed by order of any such Government (or as the case may be of the Central Government)."

The Evidence Act does not make the production of a copy of the Act printed by the Official Printer or by order of Government conclusive of the correctness of the text of the Act printed, only a mode of proof is indicated. In the present case we have the 'Cultivating Tenants' Protection Act, before the issue of the Ordinance and we have the Ordinance I of 1958 both published in the Official Gazette. Then we have the latest print of the Act issued by the Government in one of their publications. The Government publication shows a revivor of the definition of the 'Cultivating Tenants' Protection Act without the amendment made by Ordinance I of 1958. A private publication of Madras Acts published by the M.L.J. Press shows the definition of cultivating tenant as substituted by Ordinance I of 1958. The question is, which version of the text is the correct one, which has statutory force. The latter would be correct, if the amendment carried out by the Ordinance enured beyond the life time of the Ordinance. The former would be correct if the Ordinance merely suspended the original definition, and the amendment was as temporary in character as the Ordinance. This question has to be answered by the Court purely as an inference of law. Craies in Statute Law VI Edition has to say the following on this aspect of the matter. At page 45 we find it said:

"When the authenticity and validity of a Statute are ascertained the next questions arising upon its construction are the correctness of the text vouched and the mode of solving any doubts arising on that head. In case of doubt as to the text of the Statute which is to be juicially noticed, *it is for the Judges to refer* to the record or document containing the most authentic copy of the Statute".

At page 48, the learned author puts it thus:

"In no case is the Official print made conclusive evidence as to the text of a statute".

It will be convenient here to set out Article 213 (2) of the Constitution.

"213 (2): An Ordinance promulgated under this Article shall have the same force and effect as an Act of the Legislature of the State assented to by the Governor but every such Ordinance—

(*a*) shall be laid before the Legislative Assembly of the State or where there is a Legislative Council in the State, before both the Houses, and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature or if before the expiration of that period a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council, if any, upon the passing of the resolution or as the case may be, on the resolution being agreed to by the Council; and

(*b*) may be withdrawn at any time by the Governor."

The Article provides that the Ordinance which shall have the same force and effect of the Legislature "shall cease to operate" at the expiration of six weeks from the re-assembly. That is, thereafter it shall have no force. The Ordinance in question here came into force immediately on its promulgation and by section 2 substituted a new definition for cultivating tenant instead of the existing one. The purpose of the Ordinance was achieved the moment it was promulgated. Once the substitution was brought about by promulgation of the Ordinance, the subsequent currency of the Ordinance was unnecessary. The Ordinance spent itself immediately on its promulgation, and need not be operative thereafter even during the remaining period of six weeks to maintain the amendment. Its operation got exhausted by the accomplishment of the purpose for which it was passed. It may be that the Legislative Secretariat who originally introduced the Bill in terms of the Ordinance providing for the repeal of the Ordinance thought that the whole procedure was unnecessary. Questions may arise as to section 4 of the Ordinance but we are not concerned

with that provision. Madras Act (XXV of 1955) itself came in as a temporary Act and was repeatedly continued till by (Madras Act VIII of 1965,) it was made a permanent Act. The fact that during the relevant period, Act (XXV of 1955) was a temporary Act cannot in my opinion affect the question. Though not relevant it is pertinent in the context, to refer to section 8-A of the Madras General Clauses Act of 1891 which deals with the effect of repeal of an Act making textual amendments in a previous Act. Section 8-A provides:

> "Where any Act to which this Chapter applies repeals any enactment by which the text of any previous enactment was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal".

Pointing out the difference between expiration of a temporary Act and the repeal of a perpetual Act, Craies on Statute Law, VI Edition at page 408 quotes Parke, B who in *Steavenson* v. *Oliver*[1], said:

> "There is a difference between temporary statutes and statutes which are repealed; the latter (except so far as they relate to transactions already completed under them) become as if they had never existed; but with respect to the former, the extent of the restrictions imposed, and the duration of the provisions, are matters of construction."

In the present case there has been no repeal of the Ordinance and section 8-A has no application, but the Ordinance is a temporary legislation and the duration of its operation is constitutionally specified. On its promulgation subject to its inherent limitations, it had all the force and effect of an Act of the Legislature. All that the Constitution says is that the Ordinance shall cease to opearte after the period. Does it necessarily involves that on the expiry of its period, all that had been done is automatically undone, even when its force is not necessary to maintain the thing done. Even if it is not so universally, when the Ordinance amends laws do the amendments cease to survive the Ordinance? Can it not be said that if an amendment once effected is continued in the statute book, the Ordinance is not thereby being continuously enforced?

In *State of Orissa* v. *Bhupendra Kumar*[2], the Orissa Municipal Election Validation Ordinance cured the invalidity in the Cuttack Municipal elections. But the Ordinance lapsed after six months. And the question was whether the invalidity which was cured by the Ordinance was revived on the expiry of the Ordinance? Gajendragadkhar, J., (as he then was), who delivered the judgment for the Court observed:

> "in considering the effect of the expiration of a temporary statute, it would be unsafe to lay down any flexible rule. If the right created by the statute is of an enduring character and has vested in the person that right cannot be taken away because the statute by which it was created has expired. If a penalty had been incurred under the statute and had been imposed upon a person, the imposition of the penalty would survive the expiration of the statute. That appears to be the true legal position in the matter".

Proceeding we find at page 954 of the Report the following observation:

> "Therefore even as regards the effect of the repealing of an earlier Act made by a temporary Act, the intention of the temporary Act in repealing the earlier Act will have to be considered and no general or inflexible rule in that behalf can be laid down in some cases the repeal effected by a temoprary Act would be permanent and would endure even after the expiration of the temporary Act".

The learned Judge refers to the dicta of Parke, B. in *Steavenson* v. *Oliver*[1], above cited and extracts with approval the terse expression of the principle by Lord Ellenborough, C.J., in *Warren* v. *Windle*[3]:

1. (1841) 8 M. & W. 234: 151 E.R. 1024.
2. A.I.R. 1962 S.C. 945.
3. (1803) 3 East. 205 at pp 211-212; 102 E.R. 578.

"a law, though temporary in some of its provisions, may have a permanent operation in other respects. The State 26 Geo. 3 c.108 professes to repeal the statute of 19 Geo.2.c.35, absolutely, though its own provisions which it substituted in place of it, were to be only temporary."

The following observations of the Supreme Court in the case gives a guide line for determining the extent of the operation :

"In our opinion having regard to the object of the Ordinance and to the rights created by the validating provisions, it would be difficult to accept the contention that as soon as the Ordinance expired, the validity of the elections came to an end and their invalidity was revived. The rights created by this Ordinance are, in our opinion, very similar to the rights with which the Court was dealing in the *case of Steavenson*[1] and they must be held to endure and last even after the expiry of the Ordinance. The Ordinance has in terms provided that the order of the Court declaring the elections to the Cuttack Municipality to be invalid shall be deemed to be and always to have been of no legal effect whatever and that the said elections are thereby validated. That being so, the said elections must be deemed to have been validly held under the Act and the life of the newly elected Municipality would be governed by the relevant provisions of the Act and would not come to an end as soon as the Ordinance expires".

Applying the principles found in the aforesaid decision of the Supreme Court and particularly the dicta of Lord Ellenborough, C.J., that a law however temporary in some of its provisions may have a permanent operation in other respects, which the Supreme Court has approved, it appears to me that having regard to the character of the provisions of the Ordinance in relation to the amendment, it is intended to be permanent feature and the amendment having been carried out in the parent Act, it would stand notwithstanding the expiry of the Ordinance in the usual course. The effect of the expiry of an Ordinance which has the force of a temporary Act, must depend upon the nature of the provisions contained in the temporary Act—whether they have to be of an enduring character or not. No doubt as pointed out by the Supreme Court in the aforesaid case referring to the decision in *S. Krishnan* v. *State of Madras*[2].

"The general rule in regard to a temporary statute is that in the absence of special provision to the contrary, proceedings which are being taken against a person under it will *ipso facto* terminate as soon as the statute expires",

and the provision of the General Clauses Act in relation to the fact of repeal of Acts do not apply to a temporary Act. But here what is required is not the continued operation of the temporary statute and the nature of the provision reveals that the intention of the Legislature is to effect a permanent substitution in the Act, not just for the life of the Ordinance. In my opinion having regard to the principles evolved it would not make any difference that we are here concerned with the amendment of an Act and not specific rights acquired by individuals under an amendment made by a temporary Act.

In this view it is not necessary to discuss cases like the one in *State of Uttar Pradesh* v. *Jagamander Das*[3], referred to by the learned Counsel for the respondents. In *State of Uttar Pradesh* v. *Jagamandar Das*[3], the Supreme Court held that an expired Act is not covered by the rule enunciated in section 6 of the General Clauses Act which modifies the General rule that when a statute is repealed or comes to an automatic end by efflux of time, no prosecution for acts done during the continuance of the repealed or expired Act can be commenced after the date of its repeal or expiry because that would amount to the enforcement of a repealed or dead Act.

It is necessary to refer at some length to the decision of the Judicial Committee in *Gooderham & Worts* v. *C. B. Corporation*[4], a case from Canada. In that case the validity of a lease under the Canadian Radio Broadcasting Act, 1932, came up for

1. (1841) 8 M. & W. 234: 151 E.R. 1024.
2. (1951) S.C.J. 453 : (1951) 2 M.L.J. 105 : A.I.R. 1951 S.C. 301.
3. A.I.R. 1954 S.C. 683.
4. A.I.R. 1949 P.C. 90.

consideration. Section 9 (*b*) of the Act which empowered the Broadcasting Commission to acquire existing private stations by lease gave an unrestricted and unconditional power in the matter. But before the lease in question was signed, a temporary Act was passed which repealed section 9 (*b*) and substituted a new paragraph whereby the power of the Commission to acquire the existing private stations by lease was expressly made subject to the approval of the Governor in Council. The operation of the amending Act was continued down to 30th June, 1935 by two further Acts. Then an Act was passed finally on 5th July, 1935, whereby the opeation of the amending Act was extended to 31st March, 1936 but only till then. The sections of the temporary Acts prescribing successive dates of expiry of the temporary legislation were repealed. With reference to the lease that was entered into by the Commision with the appellants before the Judicial Committee question was raised as to its validity in reference to the approval of the Governor-in-Council. The following observations of the Judicial Committe in that connection do appear to support the respondents herein:

> "The sections of the three temporary Acts prescribing successive dates of expiry of this temporary legislation were repealed. The result is that on 31st March, 1936, the temporary legislation contained in the first Act of 1933 reepealing provisions of the principal Act of 1932 and substituting other provisions came to an end not by repeal of the temporary legislation but by the efflux of the prescribed time. No question as to the revival of the temporarily repealed provisions of the principal Act of 1932 by the repeal of repealing legislation arises. The repeal effected by the temporary legislation was only a temporary repeal. When by the fiat of Parliament the temporary repeal expired, the original legislation automatically resumed its full force. No re-enactment of it was required. This is what sub-section (3) of the Act of 5th July, 1935 was designed to make clear. The principal statute of 1932 is to be read on and after 1st April, 1936 as if the temporary legislation had never been enacted ; it is to be in force as if there had been no temporary legislation affecting its provisions".

But these observations have to be weighed on the provisions of the Act the Judicial Committee was considering. Sub-section (3) which their Lordships were referring to specifically provided that on and after the first day of April, 1936, the statute of 1932 shall be read as if the temporary statutes had "never been enacted". Even then, proceeding their Lordships observed :

> "Sub-section (3) does not say that the temporary Acts are for all purposes to be treated as if they had never been enacted. It says only that the principal Act is to be read in future as if the temporary Acts had never been enacted......
>
> Accordingly, in their Lordships' opinion, the respondents are not precluded by the terms of the Act of 5th July, 1935, from now maintaining that under the temporary Act of 23rd May, 1933, the approval of the Governor-in-Council was essential when the lease in question was signed. The appellants are not entitled to say that the Court has been enjoined by Parliament to disregard the temporary Act of 23rd May, 1933, as if it had never been enacted".

It could no doubt be said that the Judicial Committee was dealing with the lease executed during the currency of the temporary Act and they specifically pointed out that on the expiry of the temporary repeal, the original legislation automatically resumed its full force. But here again the language of the related statute is important. The final Act of 1935 by an express provision sub-section (1) said, that the provision of the first amending Act (by repeal and substitution) shall be deemed always to have been and hereafter they shall be operative and enforced only until 31st day of March, 1936. The repeal and substitution was by specific words kept operative up till a particular period. Actions taken during the period, the Judicial Committee holds have to confirm to the provisions of the temporary Act.

It is relevant when on this decision to refer to the Madras General Clauses Act, 1891. Section 23 of the Act makes the Provisions of the Act applicable to Ordinances promulgated by the Governor under Article 213 of the Constitution in

like manner as they applied in relation to Madras Acts by the State Legislature. And section 9 (*a*) of the Act provides thus :

"In any Act to which this chapter applies..........

(*a*) for the purpose of reviving, either wholly or partially repealed, it shall be necesary expressly to state such purpose ".

In Craies on Statute Law, Page 418, VI Edition, the principle is thus stated :

" If an Act which repeals an earlier Act is itself only a temporary Act, the general rule is that the earlier Act is revived after the temporary Act is spent ; and inasmuch as *ex-hypothesi* the temporary Act expires and is not repealed, the rules of construction laid down by sections 11 (1) and 38 (2) of the Interpretation Act, 1899 do not apply. But there will be no revivor if it was clearly the intention of the Legislature to repeal the earlier Act absolutely ".

Whether the expiry of the temporary Act automatically revives the old provisions as temporarily repealed by the amendment, or by the substitution is purely a question of construction. Reference may usefully be made here to the observations of Collins L.J., in *New Windsor Corporation* v. *Taylor*[1].

" That an Act which, while substituting temporary provisions only, purports to repal a prior permanent one will not be read as merely suspending its operation during the currency of the repealing statute unless the intention of the Legislature to that effect be expressed was decided by Lord Ellenborough in *Warren* v. *Windle*[2]:'

There is nothing to suggest in the instant case whether the change in the definition whether looked upon as an amendment, or repeal and substitution was intended to be temporary only. On the amendment being carried out in the parent Act, to that extent the Ordinance ceased to be operative. No doubt the Ordinance as such expired later by efflux of time. It could be well said that a repeal of the Ordinance in the instant case would only be ex *abundanti cautela*. There are other provisions in the Ordinance particularly section 4 on which different problems may arise. But we are not confronted with by any such problem here.

The Legislature could if it was so minded have by resolution disapproved the Ordinance or by an Act restored the original defintion.

In *Jagendra* v. *Superintendent, Dum Dum Special Jail*[3], referring to *Steavenson* v. *Oliver*[4], it is observed :

" The principle underlying that decision appears to have been that transaction that have been completed, rights, that have been acquired and penalties that have been incurred while a statute is in force, are not (in the absence of an express provision to the contrary) affected by the mere fact of the statute having ceased to be in force, a principle which has since received statutory recognition in the Interpretation Act of 1889 in the case of express repeal, though not as yet in the case of expiration by effluxion of time. This rule seems to me to be founded not only on considerations of conveneince, but also of reason and justice, and it ought in my opinion to be kept prominently in mind........".

In the present case, having regard to also the principle of section 9 (*a*) of the General Clauses Act, even though section 8-A dealing with the fact of repeal of an Act making textual amendment in a previous Act is not applicable, it looks to me that the amendment which became a part of the Act continued even after the expiration of the period of the Ordinance. If there is no automatic revival of the original definition of a cultivating tenant on the expiration of the period, and that looks to me to be the position, we will be left without any definition of a cultivating tenant in the Cultivating Tenant Protection Act. Such a consequence is impossible to contemplate. No decision directly applicable has been placed before me and in the light of the foregoing discussion, I am inclined to hold that the substitution of

1. L.R. (1898) 1 Q.B. 186 at 204.
2. (1803) 3 East 205 at pp. 211—212 ; 102 E.R. 578.
3. A.I.R. 1935 Cal. 280.
4. (1841) 8 M. & W. 234 ; 151 E.R. 1024.

the definition of 'cultivating tenant' by Ordinance (I of 1958) was intended to be continued in the Statute Book even after the expiry of the period of the Ordinance. It was not a temporary measure, suspending for the duration of the Ordinance, the original definition. The Explanation to the definition, the bone of the contention fits in squarely to the parent definition as an integral part of it. The Act specifically excludes the intermediary from the definition of a cultivating tenant. He gets no protection under the Act, but the tenant under him may be a cultivating tenant. The Ordinance obviously intends to protect such tenants who are really tied to the holding from unjust eviction a purpose coeval with the object of the parent Act. A reference to the Explanatory statement accompanying the Ordinance confirms this view. It is said that for the purpose of Madras Act (XXV of 1955), sub-tenants of holding under a landlord should be deemed to be cultivating tenant if the lessor of sub-tenants ceases to be tenant of such landlord and that the Ordinance gives effect to the object—surely not a temporary purpose.

While I am thus led to conclude that the definition of cultivating tenant which governs these cases should be the definition substituted by Ordinance (I of 1958), I find that it cannot help the appellants, as on my interpretation of the Explanation to the definition which is relied upon by the appellants, they will not be entitled to relief in these suits. The Explanation provides that a sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such tenant has ceased to be the tenant of such landlord. The Explanation, why for the matter, the definition itself contains several words expressive of the relationship between the person taking land for cultivation under another. We have the expressions, landlord, lessor, tenant, intermediary and sub-tenant. For a person to be a cultivating tenant the prime requirement is, he must carry on personal cultivation of the land under a tenancy agreement express or implied and would include a person who continues in possession of the land after the determination of the tenancy agreement. The Act defines landlord in relation to the holding or part thereof as the person entitled to evict the cultivating tenant from the holding or part. 'Holding' means under the Act a parcel or parcels of land held by a cultivating tenant. Having regard to the definition of personal cultivation in the Act, one thing is clear from the definition of "Cultivating tenant". With reference to the same parcel of land, there cannot be two cultivating tenants. There can only be one cultivating tenant with reference to one parcel of land. The Act gives protection from eviction only to the cultivating tenant. But the protection is lost on specified events. A cultivating tenant may be evicted from his holding or any part thereof by the landlord on grounds set out in section 3 (2). A reading of the Act shows that a person who becomes a cultivating tenant of the land does not cease to be so by losing the protection under the Act and subjecting himself to eviction in terms of the Act. In *Venkatarama Iyer* v. *Asan Mohammed Rowther*[1], Srinivasan, J., observed

> "Quite obviously he was a cultivating tenant when he took lease of the lands and by reason of violating certain of the provisions of the Act, he has brought himself within the scope of those provisions which entail eviction. He does not for the sole reason that he has subleased the lands cease to be a cultivating tenant not amenable to the processes of the Act."

We have to examine the *Explanation* in this background.

In the appeals before me the finding of the Courts below which I have accepted, is that the first defendant in the suits has been the cultivating tenant of the holding The second defendant in the suits have been sub-tenants under him. While there is the first defendant on the holdings as a cultivating tenant of the plaintiffs, the second defendant cannot also claim to be a cultivating tenant of the plaintiffs. The question is does the *Explanation* make them cultivating tenants under the owner, on the first defendant losing the protection of the Act. I find considerable obscurity in the *Explanation*, and the only way out is to give the expressions 'lessor', 'sub-tenant' and 'tenant' therein, the meaning appropriate in the context. The *Explanation* provides

1. (1961) 2 M.L.J. 277 : (1961) 74 L.W. 795.

that a sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of the sub-tenant has ceased to be a tenant of such landlord. It looks to me that the sub-tenancy referred to in the *Explanation* must be under a person who is himself not a 'cultivating tenant'. The *Explanation* uses the word 'lessor' in relation to the tenancy of the sub-tenant, obviously implying that the sub-tenancy is not under a cultivating tenant. The *Explanation* requires for a sub-tenant to be deemed to be a cultivating tenant, that the lessor of the sub-tenant has ceased to be a tenant of the landlord—not that the lessor has ceased to be a cultivating tenant of the landlord. The statutory tenancy is one thing, its privileges another. They may be forfeited and so disentitled to cultivating tenant to protection from eviction. A cultivating tenant may not be a tenant under the general law, his tenancy might have ceased and he might be continuing in occupation as a cultivating tenant, *i.e.*, under a statutory tenancy. We have two expressions, the general expression " tenant " and the special expression " cultivating tenant " in the *Explanation*. Though the word " tenant " standing by itself could include a cultivating tenant, it is obvious when in the *Explanation* in relation to the landlord the word used is tenant, the more general term is used in a meaning excluding the specific relationship of a cultivating tenant.

The sub-lessee from the person holding immediately under the landlord is referred to only as a sub-tenant and it speaks of the lessor of the under-tenant ceasing to be the tenant of the landlord. Adequate significane must be given to the expressions, lessor, sub-tenant and tenant when considered in juxta-position with the expression cultivating tenant. The Legislature must have had a purpose in using the several words. An ordinary tenant may cease to be a tenant of the landlord on the expiry of the period of the lease, by forfeiture or otherwise in accordance with the common law and provisions governing the relationship between the landlord and the tenant. There is no cessation of the statutory tenancy in the sense a tenancy may cease; the statutory tenant loses his protection. On eviction or surrender, he loses the status of statutory tenant which the law conferred on him. Now the Act seeks to give protection to the actual cultivators of the land and not to farmers of rents and intermediaries. This is brought about in the definition itself when it is specifically provided that the definition of the cultivating tenant does not include a mere intermediary or his heirs. The intention of the *Explanation* is clear that the termination of the tenancy of persons who are not cultivators, pesons who have taken out leases for farming it out to cultivators or as merely collectors of rent should not result in the ousting out of the actual tillers of the soil, lessees from tenants who are just intermediaries. The term intermediary is not defined but the meaning is clear. The reference is to a person who is interposed between the actual occupant of the land and the owner, like *ijaradars* and persons who take over leases of lands already under cultivation by tenants if we may use the expression over-lessees. But a cultivating tenant cannot secure to his under lessee the statute of a cultivating tenant under the owner by offering to surrender his tenancy. He enjoys certain immunities and after having had the benefit of it for a while, he cannot simply walk out of the picture putting up another as the cultivating tenant, the process getting repeated. The Act while protecting a class of tenants seeks to secure to the landlord his lawful rent in a summary way. To permit cultivating tenants to walk out may deprive the landlord some of the reliefs conferred on the landlord under the Act. It may be that the Legislature while protecting the cultivating tenant who lawfully came on the land did not want them to foist on the landlord irrespective of his inclinations strangers as cultivating tenants. It is one thing if the landlord had left the choice of the tenants of his land in general to a farmer of rent or intermediary or his existing tenants had been brought under an intermediary. It is quite a different thing to give a sub-lessee from a protected tenant who has no interest in the land rights of a protected tenant. In this view I am taking I am fortified by the decision of the Division Bench of this Court in *Ganapati Aiyar* v. *Ayyakannu*[1], where this Court held that an underlessee from a cultivating tenant cannot claim

1. (1961) 1 M.L.J. 217 : I.L.R. (1961) Mad. 452 : (1961) 74 L.W. 117 at 121.

to have any interest in the land derived from the cultivating tenant as such interest as is conferred upon the cultivating tenant is pucly personal to him and his heirs. It was observed :

" It must be noted that even a cultivating tenant enjoying the privilege of the enactment is only a statutory tenant in respect of whom and in whose favour it is impossible to conceive of an estate as between himself and the landlord. The statutory tenant has only the statutory right conferred on him by the special enactment ".

This decision no doubt related to a tenancy prior to Ordinance (I of 1958) and the learned Judges had not to interpret the *Explanation* introduced by the Ordinance. All the same having regard to the language of the *Explanation*, one may properly interpret it in accordance with the general principles applicable in such matters. As pointed out in Maxwell on the Interpretation of Statutes, 11th Edition page 183 :

" In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases of doubtful significance, be presumed to be the true one ".

It follows that the appellants who are only sub-lessees of the cultivating tenant cannot claim to oust the jurisdiction of the Civil Court and seek the protection of the Cultivating Protection Act.

In the result, the second appeals fail and are dismissed. There will be no order as to costs.

Leave granted.

S.V.J. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE R. SADASIVAM AND MR. JUSTICE K. N. MUDALIAR.

Queensland Insurance Co., Ltd. ... *Appellant**

v.

Rajalakshmi Ammal and Others ... *Respondents.*

Motor Vehicles Act (IV of 1939), section 96. Motor Car Insurance—Nature of policy—Policy issued to owner—Cover of claims for death or bodily injury caused to third parties by rash and negligent driving—No cover if the car is used for hire—Sale of car to another—That other hiring the use of the Car to a stranger—Accident during the currency of hire—Insurer if liable to indemnify the purchaser of the car (the new owner).

One *R* purchased the car from the transferee of the original owner who insured with the appellant or rather renewed the policy of insurance transfered to him and recognised by the insurer. *R* let out the car on hire to *S*. While the hirer was using the car it met with an accident owing to the negligence of the driver in dozing off and 2 of the occupants were injured and the third met with his death. The injured and the legal representatives of the deceased (occupant) filed suits for damages against *R* the transferee owner at that time and the appellant who issued the policy to the original owner from whom transferee *R* had purchased the car insured.

This appeal is against the decrees passed against the appellant (along with the owner *R*.) and the appellants contention is that once the insured had parted with the property in the car insured the insurers liability to indemnify the insured against damages arising from rash and negligent driving ceased and if the car is hired out for use by a stranger then there is no cover in the policy in case of accidents during the period of the hire.

*Appeal No. 444 of 1963. 23rd July, 1969.
Appeals Nos. 159 and 160 of 1964.

Held : An insurance policy is a contract of personal indemnity and the insurers cannot be compelled to accept responsibility in respect of a third party quite unknown to them.

The appellant in the instant case had not issued the policy to *R* (the owner at the time of accident) and is not precluded from raising pleas in defence other than those mentioned in section 96 (2) of the Motor Vehicles Act, 1939.

The admitted facts are that the original owner who insured with the appellant against 3rd party risk had sold it to another who in turn has sold the same to *R* the owner at the time of the accident. It is also found from the pleadings and evidence that *R* used the car for hire to one *S*, who was in charge of the car at the time of the accident.

The policy issued to the original owner lapsed on his parting with the property in the car to the transferor to the present owner *R* who may be vicariously liable. Further the policy does not cover third party risk when the car is used for hire and as such even if *R* could avail of the policy issued to the original owner the appellant is not liable to indemnify the claims against the owner arising out of the accident.

Appeal against the decrees of the Court of the Subordinate Judge (Principal) Tiruchirapalli dated 26-12-1962 in Original Suit Nos. 84 of 1962 (Pauper Suit) 132 of 1961 and 171 of 1962 respectively.

M. P. Subramanian and *K. L. Krishnan*, for Appellants.

R. Ramamurthy Iyer, R. Srinivasan and *T. N. C. Varahan*, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J.—The appellant, the Queensland Insurance Co., Ltd., in these appeals, was the second defendant in the three suits, O. S. No. 132 of 1961 filed by Swaminatha Mudaliar, O. S. No. 171 of 1962 filed by Lakshmikanthamma, wife of the said Swaminatha Mudaliar, and O. S. No. 84 of 1962 filed by the legal representatives of Sivagnana Thevar, in the Court of the Subordinate Judge of Tiruchirapalli, for damages for rash and negligent driving of the motor car, MSY 4891, by one Pitchai, who was employed as driver by one N. Radhakrishnan, the then owner of the car, who was impleaded as the first defendant in all the suits, resulting in a serious accident causing injuries to Swaminatha Mudaliar and his wife, Lakshmikanthamma, and the death of Sivagnana Thevar. It is not disputed that the driver, Pitchai, dozed off while driving the car along Tiruchirapalli-Turaiyur road and that this resulted in the car swerving from the road and dashing against the culvert near the milestone indicating 17 miles 2 furlongs. The driver of the car was prosecuted under section 304-A, Indian Penal Code, convicted and sentenced.

There is no dispute about the quantum of damages assessed and decreed by the lower Court in favour of the plaintiffs in each of the suits. One M. A. M. Kasi was impleaded as the third defendant in each of the suits, but he was exonerated as he had only taken a hire-purchase agreement for the loan advanced by him to N. Radhakrishnan. A plea was raised in the lower Court that it had no jurisdiction to try the suits and that the claims should have been made before the Tribunal constituted under section 110-A of the Motor Vehicles Act. But as the accident in this case occurred on 9th September, 1960, that is, prior to the constitution of the Claims Tribunal under the Motor Vehicles Act, the plea of jurisdiction was not pressed in the lower Court.

The appellant-insurance company put forward two contentions, namely, that the insurance policy issued by it to the original owner, T. M. Radhakrishna Chetty, lapsed on his selling the car and hence the insurance company could not be called upon to indemnify the vicarious liability of the first defendant, N. Radhakrishnan, for the rash and negligent driving of the driver, Pitchai, and that, even under the terms of the policy, there could be no liability of the insurance company in view of the fact that the vehicle was hired by N. Radhakrishnan to Swaminatha Mudaliar to attend a marriage. The learned principal Subordinate Judge negatived both the pleas of the appellant and decreed the suits against the appellant and the owner, N. Radhakrishnan.

The appellant-company issued the policy, Exhibit B-4, to the then owner of the car, A. K. Muthukumaraswamy Chetty, agreeing to indemnify the insured in respect of his liability to third parties for death or bodily injury caused to persons by rash and negligent driving of the car. But the policy does not cover the use of the car for hire. The period of the policy was from 18th May, 1959 to 17th May, 1960. Subsequently, A. K. Muthukumaraswamy Chetty sold the car to T. M. Radhakrishna Chetty on 8th August, 1959, and intimated the same to the appellant, as evidenced by Exhibit B-19. T. M. Radhakrishna Chetty, in his turn, wrote the letter Exhibit B-30, to the appellant and the policy was transferred in his name, as evidenced by Exhibit B-22. Subsequently, T. M. Radhakrishna Chetty renewed the policy for another year from 18th May, 1960, to 17th May, 1961, subject to the conditions of policy already referred to in July, 1960. The first defendant, N. Radhakrishnan, purchased the car from one M. Rajarathnam Pillai, who had purchased the car from T. M. Radhakrishna Chetty earlier on 23rd June, 1960. But he did not notify the insurance company, or attempt to get any transfer of the policy in his name. In fact, even his vendor, M. Rajarathnam Pillai, did not notify his purchase of the car to the appellant-company.

As soon as he came to know of the accident, the first defendant, N. Radhakrishnan, sent the telegram, Exhibit B-25, to the appellant. The branch manager of the appellant-company tried unsuccessfully to contact T. M. Radhakrishnan Chetty on the phone and subsequently sent the letter, Exhibit B-27. The appellant-company sent D. W. 3, Saunders, automobile engineer, to inspect the vehicle and make local enquiries. T. M. Radhakrishna Chetty sent the letter, Exhibit B-28, to the appellant stating that he had sold the car to M. Rajarathnam Pillai even on 23rd June 1960, and handed over the insurance policy along with the other documents to the buyer and that the entire risk was on the buyer. D. W. 3, Saunders, contacted the first defendant, N. Radhakrishnan, and learnt from him that he had lent the car on hire to the occupants of the car at the time of the accident.

The learned Advocate for the appellant relied on the Bench decision of this Court in *Bhoopathy* v. *Vijayalakshmi*[1], where it has been held, overruling the earlier decision of a single Judge in *Madras Motors Insurance Co., Ltd* v. *Mohamed Mustafa Badsha*[2], that the insurer is not liable to the transferee for damages awarded to a third party for injuries caused by rash and negligent driving of the car on a date subsequent to the transfer of ownership. Sri R. Ramamurthi Iyer appearing for the respondents-plaintiffs urged that the Bench decision is only *obiter* as the policy in that case had expired prior to the date of the accident and an attempt to renew the policy was made only a day after the accident. But the principles enunciated in that decision are correct and there is no reason to doubt the same.

It is clear from paragraph 855 at page 373 of *Chitty on Contracts*, Volume 2 that a contract of insurance will normally be construed at a contract of indemnity. It is clear from paragraph 913 of the same volume 2 at page 403 that the main cover will usually be by reference to a specified car, owned by the policy-holder and the whole policy will then only remain effective while he retains an interest in that car. It is stated that even if it contains an extension in respect of the use by the policy-holder of any car being used at the time of the accident, "instead of the insured car", this extension will cease to be effective once he has parted with the car insured. This statement of the law is based on *Rogerson* v. *Scottish Automobile & General Insurance Co. Ltd.*[3] Lord Macmillan has pointed out in the decision that the assured cannot, within the meaning of the policy, use another car instead of the insured car after he has parted with the property in the insured car. He has observed that if the assured has parted with the property in the insured car and buys another car, he cannot be said to be using his new purchase instead of the car he has sold and that he is using the new car in succession to the insured car, not instead of it. It is clear from paragraph 913 of *Chitty on Contracts*, volume 2, referred to above, that a complete change of ownership of a vehicle will put an end to the policy. In *Peters* v.

1. (1965) 2 M.L.J 466 : I.L.R. (1966) 2 Mad. 65.
2. (1960) 2 M.L.J. 202 : (1960) 30 Comp. Cas (Ins.) 25.
3. (1931) All E.R. 606 : 48 T.L.R. 17.

General Accident Fire & Life Assurance Corporation Ltd[1], it has been held that when the vendor sold the car, the insurance policy automatically lapsed. It is clear from the decision that an insurance policy is a contract of personal indemnity and the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them. The following passage at page 634 of the judgment is relevant for the present discussion:

"I have no doubt, therefore, that you cannot assign a motor policy in the way that it is suggested it was done here. If you sell your car, you cannot, merely by handing over your car and saying: 'Take this policy and do what you can with it: I assign it to you', put the underwriters under an obligation to indemnify the purchaser, when they have agreed only to indemnify the vendor. Consequently, on all grounds here the action, in my opinion, fails. Sorry as I am for Mr. Peters, he is thus left with an award of damages and costs amounting to some £500, and only somebody who has not 500s. to proceed against. In this case, I cannot say that the person who injured him was insured. The fact was that he was driving an uninsured car. Whether he knew it or not, I do not know. I should think he probably did know it, inasmuch as his vendor gave him a form to fill in. However, that is not a matter with which the defendants are concerned. They are quite entitled to say, and do say: 'We know nothing of Mr. Pope. He is not on our books, and, so far as we are concerned, he is an uninsured person'."

It is clear from the facts of this case that the appellant gave the policy only to T. M. Radhakrishna Chetty agreeing to indemnify him in respect of any liability that he may incur to third parties by reason of rash or negligent driving of the car. Neither the first defendant, N. Radhakrishnan, nor even the prior owner, M. Rajarathnam Pillai, made any attempt to get a transfer of the policy. The first defendant, N. Radhakrishnan, did not get a transfer of the policy in his favour at any time prior to the accident. Even the prior owner, M. Rajarathnam Pillai, did not attempt to get the policy transferred in his name, though it was handed over to him by the previous owner, T. M. Radhakrishna Chetty, as seen from Exhibit B-28. But the mere handing over of the policy cannot impose any liability on the appellant and this is clear from the passage quoted above.

It should be noted that the policy issued by the appellant does not specifically provide for transfer, though such transfers are usually done by the company at the request of the policy-holder on payment of the prescribed fee.

Shri R. Ramamurthi Iyer relied on the decision in *Bir Singh* v. *S M. Hashi Rashi*[2] where an insurance company was made liable both on the ground that it had failed to prove that there was a clause in the policy requiring the insured to obtain the assent of the insurer of the change of ownership of the vehicle and also on the ground that the insurer failed to prove by producing the necessary documents that the transfer was notified and recorded by it. The actual decision proceeds on the basis that the insurer kept back the register of policies, and that it should therefore be presumed that the transfer of ownership had been notified to the insurer and it had admitted the same. It is clear from the decision that the policy issued to cover third party risks is a policy of indemnity of the person named in the policy. In other words, the concluding words of sub-section (5) of section 95 of the Motor Vehicles Act refer to indemnity only of the person or classes of persons specified in the policy and the nature of the policy of guarantee depends upon the terms of the contract read along with the provisions of the Act. It has been held in the above decision, that if there be in the policy a provision which requires a transfer of ownership of the vehicle to be assented to by the insurer and only on proof of such a fact the cover will enure to the benefit of the transferee from the owner who had taken out the policy, such a provision will not militate against any of the existing provisions of the Motor Vehicles Act and that the law does not make any provision to counteract the effect of such a clause. It has been further held in that decision that if such a restrictive clause as regards the rights of a transferee from the previous owner of the motor vehicle is found in a third party insurance policy, and no approval of a transfer is obtained from the insurer but the motor vehicle is registered by the transport authorities, the result is that the vehicle runs without the cover of a policy. This decision does not lay down that in the case of policies issued to a particular person containing indemnity clause in his favour alone and not providing specifi-

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1. (1937) 4 All E.R. 628.
2. A.I.R. 1956 Cal. 555.

cally for transfer with the assent of the insurer, the policies will not lapse by transfer of ownership of the car of the assured. If it purports to lay down such a principle, it will be clearly wrong.

Sri R. Ramamurthi Iyer relied on the decision in *Vanguard Fire and General Insurance Co., Ltd.* v. *Sarla Devi*[1], and the decision of the Supreme Court in *British India General Insurance Co.* v. *Captain Itbar Singh*[2], in support of his contention that an insurer is entitled to depend only on those grounds mentioned in sub-section (2) of section 96 of the Motor Vehicles Act, and no other. It is clear from section 95 (5) of the Motor Vehicles Act that a person issuing a policy of insurance under the section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons. Section 96 of the Motor Vehicles Act refers to the duty of insurers to satisfy judgments against persons insured in respect of third party risk. Thus, if the appellant-company had been impleaded as one who had issued an insurance policy to the first defendant in respect of third party risk, it would be entitled to put forward only the defences mentioned in section 96 (2) of the Act. But the appellant in this case has not issued any such insurance policy to the first defendant and it is certainly open to the appellant-company to plead that it has not issued any policy to cover the liability of the first defendant, N. Radhakrishnan, and that the policy issued by the company to T. M. Radhakrishna Chetty had lapsed and cannot be availed of by the first defendant. It follows that the policy issued by the appellant-company to T. M. Radhakrishna Chetty had lapsed and it cannot be availed of by the first defendant to indemnify the claim made against him by the plaintiffs in these suits.

The only other point urged in these appeals is that even under the terms of the policy, the appellant cannot be made liable as the car had been hired by the first defendant to Swaminatha Mudaliar, who travelled in the car at the time of the accident. The learned Subordinate Judge did not accept the plea of the appellant that the first defendant had hired the car to P. W. 2, Swaminatha Mudaliar. It is difficult to expect the appellant to adduce direct evidence to prove that the first defendant, N. Radhakrishnan, hired the car to Swaminatha Mudaliar. But, in our opinion, the learned Subordinate Judge has not given due weight to the admission of the first defendant spoken to by D. W. 3 and the strong pieces of circumstantial evidence supporting the claim of the appellant. The first defendant, N. Radhakrishnan, admitted in cross-examination that he was a bus conductor in V. T. Transport, Tiruchi, on a basic salary of Rs. 55 and a monthly allowance of Rs. 35. He does not own any immovable property and he is residing in his mother's house. He ceased to be a conductor only six months prior to his giving evidence on 15th December, 1962, that is long after the occurrence in this case. He is employed temporarily to drive cars. According to him, he borrowed Rs. 6,500 from the third defendant, under a hire-purchase agreement, and with a sum of Rs. 3,000 kept by him purchased a car from M. Rajarathnam Pillai. In respect of the said loan taken under the hire purchase agreement, he made two payments of Rs. 355 each under Exhibits B-1 and B-2 in August and September, 1960. He claims to have discharged the loan under the hire-purchase agreement by paying Rs. 4,500 by the sale of the car after the accident. He was paying Rs. 60 per month as salary for the driver of the car. Having regard to the above facts, it is highly probable that he used the car by letting it out for hire, though he denied the suggestion. He denied the suggestion that he gave the car on hire to P. W. 2. In his chief examination he stated that as P. W. 2 was well-known to him, he lent the car and that he did not give it to him for hire or reward. But his plea in his written statement in O. S. No. 84 of 1962 is totally different. In the other two suits he merely pleaded that the lower Court had no jurisdiction to try the suit. In his written statement in O. S. No. 84 of 1962 he has stated that on 8th May, 1962, he directed

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1. I.L.R (1959) Punj. 714 : (1959) 61 Punj. L.R. 683 : A.I.R. 1959 Punj 297.
2. (1960) S.C.J. 44 : (1960) 1 S.C.R. 168 : (1960) 1 An.W.R. (S.C.) 6 : (1959) 29 Comp. Cas. (Ins.) 60 : (1960) 1 M.L.J. (S.C.) 6 : A.I.R. 1959 S.C. 1331.

the driver, Pitchai, to take the car to workshop as it was consuming lot of oil and that the driver unauthorisedly appears to have taken Swaminatha Mudaliar and his family in the car to Thuraiyur and that on the way the car met with the accident. Thus his plea is that the accident having resulted during a trip undertaken by Pitchai contrary to the express direction given by him to take the car to the workshop, he cannot be held liable at the instance of Swaminatha Mudaliar or his wife or the plaintiffs in O. S. No. 84 of 1962.

P. W. 2 Swaminatha Mudaliar, the plaintiff in O. S. No. 132 of 1961, on the file of the lower Court, has stated in his written statement that he is the proprietor of Messrs. Peacock & Co., a high class cigar manufactory at Woriyur, that he is a landlord and a honorary magistrate of the town Bench Court at Tiruchirapalli and the vice-president of the Woriyur Cigar Manufacturers' Association and a member of the Tamil Chamber of Commerce, Madras, and that he is an income-tax assessee. It is difficult to believe that he had freely taken the car from a conductor to attend a marriage at Thuraiyur. Thus the circumstantial evidence strongly support the claim of the appellant that Swaminatha Mudaliar, the plaintiff in O. S. No. 132 of 1961, took the car on hire from the first defendant, N. Radhakrishnan, for attending a marriage at Thuraiyur. In fact, there is the evidence of D. W. 3, Saunders, automobile engineer, deputed by the appellant to make enquiries about the accident, that the first defendant, N. Radhakrishnan, admitted that he had purchased the car under the hire-purchase agreement and that he was hiring out the car and paying to the lender in instalments as he was not in affluent circumstances and that he had hired the car to the persons who were occupants of the car at the time of the accident. It is true D. W. 1, N. Radhakrishnan, was not specifically cross-examined as to whether he made any of the admissions to D. W. 3, Saunders, as spoken to by the latter. But suggestions have been made to D. W. 1 that he used to let the car on hire and that he gave the car to Swaminatha Mudaliar for hire. D. W. 3, Saunders, is a respectable witness and we see no reason for not accepting his evidence.

Thus, on the admission of the first defendant to D. W. 3, Saunders, and the other pieces of circumstantial evidence referred to above, we have no hesitation in finding that the first defendant had hired the car, MSY. 4891 to Swaminatha Mudaliar, the plaintiff in O. S. No. 132 of 1961, to enable him to go to Thuraiyur to attend a marriage. Thus, even if the first defendant could claim the benefits under the policy given by the appellant to the prior owner, T. M. Radhakrishna Chetty, the terms of the policy prohibiting the hiring of the vehicle will disentitle him to any indemnity.

In the result, the decree and judgment of the learned principal Subordinate Judge in so far as it makes the appellant liable for the claims in the three suits are incorrect and they are set aside and the appeals are allowed with costs. It is needless to state that we do not interfere with the decree and judgment of the lower Court made against the first defendant in all the suits.

K.G.S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE S. GANESAN.

Meiyappan Servai ... *Petitioner**

v.

Meenakshi Achi ... *Respondent.*

Limitation Act (XXXVI of 1963), *Article* 28—*Mortgage bond failing for want of registration—Suit for refund of money advanced —Limitation.*

It is well settled that, where a mortgage deed fails for want of registration or attestation or for any other purpose, it is admissible as evidence of a personal covenant contained therein for payment of the amount. It cannot also be disputed that where a time-limit is fixed for the repayment of money in a simple money bond, limitation will start only from that date.

* C.R.P. No. 969 of 1967. 2nd April, 1969.

Where therefore a mortgage bond fails because of the refusal on the part of the mortgagor to get it registered as agreed, the mortgagee will no doubt have a right to sue for the refund of the money advanced immediately after the breach occurred, but then he is entitled under the law to give up the mortgage and to sue upon the personal covenant to pay the money contained in the mortgage bond. Two contracts are comprised in such a transaction ; one is a mortgage and the other a loan and both these contracts are separate and divisible. The causes of action in respect of these two transactions are distinct and separate.

Where the mortgagee chooses to sue on the personal covenant, limitation will start only from the date when the mortgagor undertook to repay the money under the covenant contained in the bond and not from the date of the refusal by the mortgagor to register the document. In such a case the fact that the suit is only for a portion of the money contained in the bond will not make any difference ; for where a period is stipulated for the repayment of the entire sum it cannot be said that the said period will not enure for the repayment of a portion of the sum actually paid under the contract.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the order of the District Munsif, Pattukkottai in S. C. S. No. 699 of 1966.

G. Ramaswamy and *M. Kalyanasundaram*, for Petitioner.

S. Sitarama Ayyar and *S. Rajarama Ayyar*, for Respondent.

The Court made the following

ORDER.—This petition is directed against the judgment and decree of the District Munsif, Pattukkottai in S. C. S. No. 699 of 1966.

The respondent filed the suit in question for recovery of a sum of Rs. 400 (together with Rs. 88 interest on the said amount) advanced by him under a mortgage bond executed by the petitioner herein (defendant) in his favour on 12th June, 1962 for a sum of Rs. 750 on the allegation that subsequently the petitioner refused to have the mortgage registered. As per the mortgage deed, the balance of Rs. 350 had to be paid by the respondent before the Sub-Registrar at the time of registration. The Court had decreed the suit accepting the respondent's contention that the suit though filed on 13th March, 1966 three years after the date of the mortgage bond, is saved from the bar of limitation, as the mortgage money of Rs. 750 is repayable in twelve months from the date of the bond.

The only question which is pressed by the learned Counsel for the petitioner in the course of his arguments in the revision is that the suit is barred by limitation.

The mortgage bond is not registered and a personal convenant contained in the bond shows that the petitioner had undertaken to pay the sum of Rs. 750 secured by the bond together with interest at 6 per cent in 12 months from the date of the bond. The document further states, that in default of payment, the sum is payable with compound interest and can be recovered from the mortgage property.

It is well settled that, where a mortgage deed fails for want of registration or attestation or for any other purpose, it is admissible as evidence of a personal covenant contained therein for payment of the amount (*vide Pulaka veetil Mythalakulangara Kunhu Moidu* v. *Thiruthipalli Madhav Menon*[1], and *Kesavamatam Koda Nayakamma* v. *Edara Venkayya*[2]. Nor can it be disputed that where time limit is fixed for the repayment of money in a simple money bond, limitation will start only from that date.

The trial Court overruled the plea of limitation and decreed the suit on the basis of the judgment of the Rajasthan High Court in *Karan Raj* v. *Chandilal*[3]. In that case the mortgage failed and the suit was decreed for the amount secured by the mort-

1. 32 Mad. 410 (F.B.)
2. (1939) 2 M.L.J. 664.
3. A.I.R. 1964 Raj. 72.

gage on the basis of a personal covenant contained in the document, though the suit was laid more than three years from the date of advance. In that document there was a stipulation that the mortgagor would be able to redeem the property only on paying the money after a period of four years in one lump sum. The learned judges overruled the contention that the personal covenant was available only if the mortgage turned out to be a good one and not when it failed and have observed that whether the mortgage failed or not, the mortgagee had given four years time to the mortgagor to repay the money and that, having so accommodated the defendant he could not sue the latter before the expiry of four years. The cause of action in that suit for the repayment could not arise before four years.

The learned Counsel for the petitioner does not challenge the principles enumerated above ; but contends in the course of his arguments that the cause of action in the suit had arisen immediately after the petitioner (the mortgagor) refused to register the bond that in the absence of any evidence as to the date when the petitioner actually refused to register, it can be taken that the refusal was after the expiration of four months, the time prescribed for registration, that once the cause of action had started it cannot be normally stopped or suspended (under section 9 of the Indian Limitation Act) and that the present suit is barred as it had not been filed within three years after the time prescribed for registration of the bond had expired. The learned Counsel points out that there is a clear allegation in the plaint to the effect that the mortgage failed as the petitioner had refused to register the bond and that the petitioner was bound to return the sum of Rs. 400 paid as part of the consideration.

It may no doubt be said that the cause of action arises when a plaintiff could first maintain an action to successful termination ; but then it is also clear that in order to defeat a suit on a transaction, the cause of action which arose earlier must be one in respect of the same transaction to sue. In this case the respondent had no doubt a right to sue for the money when the petitioner committed breach of contract by refusing to register the mortgage bond ; but then he is entitled under the law to give up the mortgage and to sue upon the personal covenant to pay the money as in the case of a simple money bond. Two contracts are comprised in the transaction ; one is a mortgage and the other a loan transaction ; and both these contracts are separate and divisible. The causes of action in respect of these two transactions are distinct and separate. In view of the fact that the petitioner had refused to register the mortgage, the mortgage had failed and it was open to the respondent to rescind the mortgage and to file a suit, but then he is not bound to do so and he is entitled under the law to rely upon the personal covenant to repay the money.

It may be that the 12 months period stipulated was for the repayment of the entire mortgage amount of Rs. 750 and that out of this amount, only a sum of Rs. 400 alone had been paid ; but it appears to me that this circumstance can make no difference whatsoever and that the respondent is entitled to insist that he can pay the sum of Rs. 400 at the end of 12 months prescribed for the repayment of the loan. Where a period is stipulated for the repayment of the entire sum it cannot be said that the said period will not enure for the repayment of a portion of the sum actually paid under the contract. Take for instance, a bond which recites that a sum of Rs. 2,000 had been paid and stipulates that it was repayable in the two years from the date of the bond and it is conceded that only a sum of Rs.1,500 had been actually paid. Can it be pleaded in a suit for recovery of Rs. 1 500 under that bond that the period of two years would not enure for that sum and that limitation should be reckoned from the date of the advance ? The answer is 'no'; and the case is much stronger where, as in the present instance, the petitioner is a defaulter.

The cause of action for the suit based on the personal covenant had arisen only after the period of two years stipulated for the repayment of the entire amount and the fact that the respondent had a cause of action when the petitioner failed to register the mortgage can be of no consequence in this case. The two contracts are, as I have already observed entirely different and the cause of action for this suit is in

respect of the personal covenant and not the breach of the petitioner to register the mortgage.

In the result, the Civil Revision Petition is dismissed; but, under the circumstances without costs.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

R. V. Gopalan ... *Petitioners**

v.

Nill ... *Respondent.*

Civil Procedure Code (V of 1908), sections 115 and 9—Decree in suit filed by plaintiff without impleading any defendant—Revisional jurisdiction against—If can be exercised by High Court suo motu—*Validity of such a decree.*

When there is no *lis* and there is only one party (plaintiff) who succeeded in obtaining a decree that he prayed for, it is indisputable that there could be no appeal, since the successful party cannot appeal and there is no other party who has suffered a decree. Hence the exercise of revisional jurisdiction *suo motu* by the High Court against the decree would be within the law.

Every decree presupposes a *lis*, or a matter in controversy between two parties. There can be no *lis* when there is only a plaintiff without a defendant on record. Where therefore a plaintiff obtains a decree without impleading anybody as a defendant, as in the instant case, the decree would be a nullity.

Petition taken up under section 115 of Act V of 1908 on a reference made by the District Judge, Tiruchirapalli in his letter A. 7541 of 1966 to revise the decree of the District Munsif, Tiruchirapalli in O. S. No. 400 of 1966.

O. V. Baluswami, for Petitioner.

The Government Pleader (*Amicus Curiae*), for State.

The Court made the following

ORDER.—This revision proceeding arises under very singular circumstances, perhaps without any parallel in the cases that have come up in revisional jurisdiction before this Court. O. S. No. 400 of 1966 on the file of the learned District Munsif, Tiruchirapalli, was instituted by a plaintiff, on whose behalf Sri Baluswami has here submitted arguments before me, for a declaration that he (the plaintiff) belonged to the Tuluva Vellala community. In the affidavit, the plaintiff states that the said declaration was needed, to be produced before the public service Commission with regard to the consideration of his claim for appointments. There was no defendant shown upon the record, and what the learned District Munsif did, after having taken up the suit for trial, was to call for objections by a kind of proclamation, *viz.*. beat of tom-tom in the town. No one appeared in response to this proclamation, and, that suit was decreed, after examining the plaintiff, on 13th April, 1966. The declaration granted in the suit is a bare one to the effect that the plaintiff belonged to and was a member of a backward community, *viz.*, Tuluva Vellala community, entitled to the rights and privileges recognised in favour of that community, as a backward class.

It appears from the record that this matter has been taken up *suo motu* by this Court, after receiving a report from the learned District Judge under section 115 Civil Procedure Code.

Sri Baluswami raised an interesting argument, at the threshold, that such a revision proceeding may be without jurisdiction. He fully conceded the power of this Court to act *suo motu* in revisional jurisdiction. The reason alleged by him was

* C.R.P. No. 497 of 1967. 25th April, 1969.

that section 115, Civil Procedure Code, itself makes the point explicit that the case should be one decided by some Court subordinate to this Court, "and in which no appeal lies thereto. It is alleged that this was an ordinary decree in a civil suit. A regular appeal is provided for by the procedure law, which fact, would bar revisional jurisdiction.

I have carefully considered this preliminary objection and I find it to be unsubstantial. Certainly, the point would have force and weight, if there had been a decree in the suit based on a *lis*, *viz.*, controversy between two parties, when there is no *lis* and there is only one party (here the plaintiff) who succeeded in obtaining the decree that he prayed for, it is indisputable that there could be no appeal, since the successful party cannot appeal, and there is no other party who has suffered a decree. Hence, I find that the exercise of revisional jurisdiction is justified and within the law, on the peculiar and exceptional facts of this case.

The next point is, how such an extraordinary procedure came to be followed and how such a decree was passed. It is seen from the report of the learned District Judge, that some senior Counsel did appear for the plaintiff, that the difficulty with regard to the absence of a defendant was felt, and that some authority was cited which persuaded the District Munsif to adopt this extraordinary course. As the learned Government Pleader has submitted, appearing as *amicus curiae*, there are no authorities upon a point of this kind. But there is indeed, a reference in Halsbury's Laws of England, 3rd Edn. section 1610, page 747, with regard to merely declaratory judgments, which can be given "whether there be a cause of action or not." and though there is no consequential relief. But this passage has no application to the present situation. The real point here is not that the decree is only for a bare declaration without a consequential relief, such a decree would be perfectly valid, if no ancillary relief was needed for the adjudication of the claim. But, every decree, presupposes a *lis*, or a matter in controversy between two parties. There can be no *lis* when there is only a plaintiff without a defendant. Further, in the present case, it is perfectly obvious that there could have been a defendant *viz.*, the Director of Public Instruction, who according to the plaintiff, was responsible for a wrong entry or erroneous omission, which deprived the plaintiff of the protection afforded by his membership of a backward community. Since the plaintiff did not institute a *lis*, in the proper sense and there was no defendant on record, the decree is a nullity. It has accordingly to be set aside as such.

But, in the interests of justice, I equally direct that the plaint itself be remitted back to the trial Court, and that the plaintiff be now called upon to amend the plaint, by impleading a defendant or defendants, whether the Director of public Instruction or some other authority of the State. If, after the opportunity is given, for this purpose the plaintiff does not choose to do so, the suit has to be dismissed or struck off as not maintainable in law. I must here make it clear that I am carefully refraining from any observation whatever, about the present status of the plaintiff as an Officer of the State service, since Baluswami represents that the plaintiff was ultimately appointed by the Madras Public Service Commission. Also I have no reason to think that there was any lack of *bona fide* on the part of any one concerned in this suit and the consequential decree ; the error seems to be a purely due to failure to grasp the fundamental postulates of the situation. The reivision is allowed accordingly. No order as to costs.

Reference accepted;

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

P. Narayana Pillai ... *Petitioner**

v.

S. Nagamoney ... *Respondent.*

Civil Procedure Code (V of 1908), sections 144 and 151—Restitution—Duty of Court—Party-receiver appointed by Court taking possession of property—Proceedings dismissed—Duty to re-deliver possession to the original party irrespective of other rights.

An application for restitution on the termination of proceedings against a party, who has been dispossessed of his property under orders of Court, must be dealt with on broad principles of justice relating to processual law. One of the first and highest duties of all Courts is to take care that the act of the Court does not cause injury to any of the suitors before it. This principle will apply to all Courts from the lowest Court which entertained the suit to the highest Court which finally disposed of the case in appeal or revision.

Where pending an appeal against a decree declaring the right of the respondent to be in possession of a property, the appellant was appointed receiver and he took physical possession of the property from the respondent, the property is placed in *custodia legis*. When the appeal is finally dismissed and the receivership terminated, the party whose possession was disrupted under the orders of Court, will have every right to be restituted (*viz.*,) to be put back in possession.

The fact that the receiver (landlord) who is in possession is also the party claiming a right to recover possession, cannot make any difference to this broad principle. Since possession of the property was obtained under orders of Court and that order has been set aside, it is the duty of the Court to deliver back possession of the property to the party who was originally in possession.

If the other party claims any independent right to recover possession of the property he should take separate steps in that regard and cannot take advantage of his possession as the erstwhile receiver, to prevent re-delivery.

Appeal under Clause 15, Letters Patent, against the Order of Venkatadri, J., in C. M. A. No. 171 of 1963—E.A. No. 258 of 1962 in O.S. No. 49 of 1957, Sub-Court, Nagarcoil.

S. Padmanabhan and *S. Mahadevan*, for Petitioner.

K. Thirumalai, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, C. J.—The facts in relation to this proceeding have to be very clearly set forth, in the first instance, for an appreciation of the relatively narrow issue which is involved. In view of the somewhat protracted history of this litigation, we are setting forth only those outstanding facts which illuminate the sole issue now arising for our determination. O. S. No. 49 of 1957, on the file of the Subordinate Judge of Nagarcoil, was a suit by the petitioner-appellant for declaring the right of the petitioner-appellant to be in possession of item 1 of the plaint-schedule. That suit itself came to be instituted in the following manner. Item 1 was sold in execution of a decree O. S. No. 973 of 1113 M. E. and was purchased by one Sivanandan in Court auction who, in his turn assigned his rights to the defendant-respondent. When the defendant-respondent attempted to take possession of the property, he was obstructed by the appellant who claimed rights as a tenant put in possession notwithstanding the Court auction purchase and the assignment of that right. On an application under the processual law, the Court executing the petition

* L.P.A. No. 108 of 1965. 12th February, 1969.

for delivery directed removal of the obstruction. The present appellant filed O. S. No. 49 of 1957 on the file of the Subordinate Judge of Nagarcoil, under the relevant provisions of Order 21, Civil Procedure Code, for setting aside the claim order. Since the decree in that suit is of some importance, and is to be found among the typed papers, we shall immediately refer to it.

The decree in that suit states, in explicit terms that the summary order passed in the execution proceeding was to be set aside. This implied that the claim of the obstructor was upheld. But the Court also directed, as part of the decree, that the plaintiff had the right to be in possession of item 1, so long as he was not paid the value of the improvements effected, and that his right was to be so declared under the decree. This is the first stage of the relevant events.

The respondent appealed to this Court from the decree in O.S. No. 49 of 1957, and the appeal was ultimately dealt with by Kailasam, J., in which by judgment he dismissed the appeal. But, in the meantime, the respondent herein filed an application for appointment of a Receiver to the property mainly on the ground that the plaintiff (appellant) was committing acts of waste and destroying the property or diminishing the value of the property. That matter came up before Ramachandra Iyer, J., as he then was, in an interlocutory proceeding and the learned Judge directed the appointment of a Receiver. It is not in dispute between the parties that, in pursuance of this order, the lower Court appointed the present respondent as Receiver, and the record explicitly shows that though he might have obtained a symbolical delivery, earlier, he took actual delivery of the property, from the plaintiff-appellant, in his capacity as Receiver and by virtue of orders of Court. There is an observation in the judgment of Ramachandra Iyer, J., that the only right of the plaintiff appellant was to obtain a sum of Rs. 1,600 being the value of the improvements and that, the appellant had "no further right to possession of the property." This observation may not be correct for reasons that we shall set forth later ; actually, it does not appear that, in that purely interlocutory proceeding, the statutory right, now claimed by the tenant (appellant) to be in undisturbed and actual possession of the property, notwithstanding the Court auction purchase and other proceedings, was brought to the notice of the Court.

But, this matter was clearly brought to the notice of Kailasam, J., when he disposed of the appeal. In dimissing the appeal the learned Judge stated:—

"The plaintiff will of course be entitled to claim rights, if any, conferred on him by the statute as a tenant in possession.......... The order appointing Receiver pending disposal of the appeal will stand cancelled."

Subsequent to this the plaintiff instituted proceedings for restitution of possession in respect of item 1, claiming statutory rights under section 4 of the Holdings (Stay of Execution Proceedings) Act, 1950 and also basing his claim under sections 144 and 151, Civil Procedure Code. That application was dismissed by Venkatadri, J., and the Letters Patent Appeal, before us, arises in this connection.

In our view, there is a very broad principle of justice relating to the processual law, upon which an application of this character will have necessarily to be allowed. As we pointed earlier, it is not as if the respondent obtained physical possession of this property by virtue of any decree of any Court, declaring his right to possession. Had he done so, the matter would certainly have been different, but, those are not the facts. The order removing the obstruction suffered by the plaintiff-appellant had been set aside, both in the subsequent suit filed under the processual law and in the subsequent appeal before Kailasam J. No doubt, the decree in that suit declared the right of the plaintiff-appellant to be in possession until the value of the improvements was paid. It is certainly possible for learned Counsel for the respondent to contend that, on a fair interpretation of that decree, the plaintiff cannot claim any further right to be in possession strictly under the decree, after the improvements have been evaluated and the value had been paid. But the point now before us is not this. The point now before us is that the respondent was appointed as Receiver by Court, that the property was placed in *custodia legis*, and that the respondent, as the

record irrefutably, shows obtained possession, *viz.*, physical possession of the property, from the appellant by virtue of these orders and by virtue of the submission of the appellant to the authoritative direction of the Court. That implied necessarily that, if ultimately the appeal was dismissed and the Receivership terminated, the plaintiff appellant will have every right to be restituated, *viz.*, to receive back that possession which the appellant parted with, in obedience to the authoritative direction of the Court. This is a very important principle, and, there can be no penalty imposed on a party, arising from an act of obedience to the authority of the order of the Court. That principle was expressed by Lord Cairns in *Rodger* v. *Comptoir D'Escompte De Paris*[1], in the following words :—

> " One of the first and highest duties of all Courts is to take care that the *act of the Court* does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely that act of the Primary Courts or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case."

Learned Counsel for the appellant has now brought to our attention section 4 of the Act, earlier referred to, under which, according to her interpretation, her client is entitled, as a tenant in occupation, to continue in possession even if the value of the improvements be paid, until there is an actual decree or order for eviction of that tenant obtained by the landholder (judgment-debtor), or any one claiming the right of the Proprietor. Learned Counsel for the appellant contends that there is no such decree or order in this case. All that has happened is that the obstruction offered by her client was directed to be removed, that that order was set aside in appeal and that there was a declaration that the tenant was entitled to remain in possession till the value of the improvements be paid. If, after that, it is the claim of the landholder, or any one claiming under the landholder, that the tenant is liable to be evicted, the duty of the person is to take proper steps, under the law, for such eviction. Our order appointing that party as a receiver, cannot be taken advantage of, to prevent the redelivery of the property, to the person from whom the receiver took delivery, on any pretext, for that would precisely offend the principle stated by Cairns, L.C. above, *viz.*, an injury to one of the suitors would be committed indirectly, as a consequence of an interlocutory order of the Court. Hence, we have no hesitation, whatever, in holding that, whatever else might be the rights *inter se* between the parties, our receiver must hand over the possession which he obtained from the appellant, by virtue of our orders, back to the party who parted with that possession and then pursue his remedies at law, whether by way of further execution of any decree already in existence, or by way of the institution of a fresh suit, as advised. We may add that the learned Judge (Venkatadri, J.) appears to have given some interpretation that Act VIII of 1950 will not be applicable to the present situation. We are not now here construing section 4 of the Act VIII of 1950, and, indeed, the entire text of the Act and the rules is not before us, and we cannot now lay it down how precisely the procedure to be adopted, either by a landholder or a tenant, in respect of that Act, and what the forum and form of application have to be.

The Letters Patent Appeal is accordingly allowed to the extent directed above. No order as to costs.

R.M. *Order accordingly.*

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1. (1871) L.R. 3 P.C. 465: 17 E.R. 120.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE P.R. GOKULAKRISHNAN.

P. Susila, represented by her father and next friend S. Perinpamuthoo and others .. *Petitioners.**

v.

The State of Madras represented by its Secretary, Public Health Department, Fort St. George, Madras-9, and others .. *Respondents.*

Constitution of India (1950), *Articles* 15 (4) *and* 29—*Scope—Admission to educational institutions—Concession to backward classes—Classification—Omission of a particular community in the prospectus, if can justify the elimination of the community from the list of backward classes.*

It is no doubt open to the Government, from time to time, to add to or subtract from the list of backward classes. But, once a classification has been made for educational purposes, by an order of Government, and the order continues to be in force, it is difficult to perceive how without expressly modifying that order by a proper decision of the Government, a mere omission of a particular community from the list of backward classes, appended to the prospectus, can justify elimination of the community from community as backward at the selection. To do so, will be unreasonable and illogical. It cannot be that, for the purpose of concession in educational institutions, a community is considered as backward and not so for the purpose of admission in educational institutions. There appears to be no substance in the dividing line. Therefore, the petitioners ought to have received consideration at the selection, on the basis that they belong to a backward class.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to call for all the records in the case and to issue a Writ of *mandamus* directing the respondents herein to select the petitioner for one of the seats reserved for Backward Class or in the general pool and if necessary to consider the petitioner's claim as a member of the backward class for the 1st year Integrated M.B.B.S., course to commence for the academic year 1969 and give her a seat in any medical college in the State of Tamil Nadu, etc.

P. S. Sarangapani Iyengar, for Petitioner in W.P. Nos. 2509, 2510, 2173 and 2488 of 1969.

V. P. Raman and *N. R. Chandran,* for Petitioner in W.P. No. 2262 of 1969.

G. K. Damodara Rao, for Petitioner in W.P. No. 2352 of 1969.

T. Martin, for Petitioner, in W.P. No. 2385 of 1969.

The Advocate-General and Government Pleader, for Respondents in W.P. Nos. 2173, 2262, 2352, 2385 and 2488 of 1969.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The petitioners are from the Kanyakumari District and claim to belong to the Church of South India, and originally to South Indian United Church of the erstwhile Travancore-Cochin State. In G.O. Ms. 1717, dated 12th July, 1961, which amended G.O. Ms. No. 1300, dated 26th July, 1957, the C.S.I. Christians of Kanyakumari District and Shenkottah Taluk of Tirunelveli District, were added to and treated as backward class for purposes of educational concessions. G.O. Ms. No. 1013, Health, dated 26th September, 1968, stated that rule 5 (*b*) (1) relating to reservation of seats for socially and educationally backward classes was amended to read:

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* W.P.Nos. 2059, 2510, 2173, 2262, 2352, 2385 and 2488 of 1969. 21st August, 1969.

"For the purpose of this rule socially and educationally backward classes will mean those classes which are declared as such by Government."

In the prospectus issued in respect of the First Year Integrated M.B.B.S. Course, 1969-70, this particular community has not been mentioned as belonging to the backward class. The result was, all the petitioners were treated as forward class and their merits were assessed,, for purposes of selection to the Course, on that basis.

The contention for the petitioners, who have failed in the selection, is that when once Government classified the community as belonging to the backward classes and the same Government Order is still in force, it was unreasonable and illogical to omit the community from the list of backward classes appended to the Prospectus. This very point was considered by a Division Bench of this Court in W.P. Nos. 3022 of 1968, etc. and it was observed:

"The list of backward classes enclosed to the prospectus in these cases, does not include in it Nadar Christians of the Kanyakumari District, though, as per the Government Memorandum mentioned above, such Nadar Christians would be entitled to educational concessions. We would have considered the fact that the petitioner is a Nadar Christian of the Kanyakumari District—a community which has been declared to be a backward class for educational purposes in the Government Memorandum mentioned above, as a strong circumstance entitling the petitioner to the relief she claims, but for one important point, namely, that when we examined the mark list for the purpose of ascertaining the marks of the petitioner it was found that she got only 170 marks which is less then tha minimum for the backward class, namely, 180. Therefore even if she is to be given the benefit of reservation for backward classes, she would not have been selected."

Though, in that case, in view of the marks obtained by the particular candidate, both in the academic examination as also in the interview before the Committee she would, in any case, not be entitled to selection, the point was not finally decided there, the learned Judges sufficiently expressed their inclination. Independently of it, we take the same view. It is no doubt open to the Government, from time to time, to add to or subtract from the list of backward classes. But, once a classification has been made for educational purposes, by an order of Government, and the order continues to be in force, we do not see how without expressly modifying that order by a proper decision of the Government, a mere omission of a particular community from the list of backward classes, appended to the Prospectus, can justify elimination of the community from consideration as backward at the selection. To do so, will be unreasonable and illogical. It cannot be that, for the purpose of concession in educational institutions, a community is considered as backward and not so for the purpose of admission in educational institutions, There appears to be no substance in the dividing line. We consider, therefore, that the petitioners ought to have received consideration, at the selection, on the basis that they belong to a backward class.

In some of the applications filed by the petitioners, they have chosen to mention that they belong to the forward community, while making it clear that they were Nadar Christians from Kanyakumari District, belonging to the Church of South India. We do not think that the respondents can make any point out of this because the classification of the petitioners as backward did not depend upon what they stated in the application against the relevant column, but whether they had mentioned in the application that they belonged to the Church of South India. Once that appeared on the record, it would be obvious that they belong to the backward class, subject to verification, of course, that they belong to the Church of South India.

The practical effect of our observations on these petitions will be as follows. So far as W.P. No. 2352 of 1969 is concerned, we find from the list of marks maintained by the Committee, which we have sent for and perused, that the petitioner, having the interview No. 10055, secured a total of 135 marks in the P.U.C. examination and 60 marks at the interview, thus a total of 195. The minimum required for a

backward class candidate has been, as we are told by the Advocate-General, fixed at 190. The learned Advocate-General says that this candidate figures as No. 22 in the waiting list for the general pool and that, since there are 24 vacancies available under this head, there should naturally be no difficulty for this candidate to secure admission, even on the basis that she belongs to the forward class. It is sufficient to record this and formally allow this petition.

As far as W.P. No. 2385 of 1969 is concerned, the petitioner's interview number was 9864 and he secured 150 marks in the P. U. C. examination and 45 at his interview before the Committee, thus a total of 195. Treating this candidate as belonging to a backward class, we are of the view that he would be entitled to admission, because we are told that there is one vacancy available for the backward class and that the first candidate appearing in the waiting list for the backward class has secured 190 marks only. The break-up of this is 150 at the P. U. C. examination and 40 at the interview. The learned Advocate-General urged that the first candidate, who appears in the backward class waiting list, should have to be given notice before the petitioner in W.P. No. 2385 of 1969 succeeds. But the requirement, we think, is too formal a matter, for, the learned Advocate-General has placed all the necessary facts and circumstances for our consideration, and we have ourselves looked into the mark list maintained by the Committee at the interview. W.P. No. 2385 of 1969, is therefore, allowed.

So far as the other petitions are concerned, on an examination of their marks at the P.U.C. or B.Sc., examination and at the interviews, we are satisfied that they fall far below the minimum required for the backward classes and they could not in any event get admission. In W.P. No. 2509 of 1969 the petitioner obtained 120 and 60 at the P.U.C. and interview respectively, the petitioner in W.P. No. 2510 of 1969 got at the B.Sc. 100 and at the interview only 15, the petitioner in W.P. No 2173 of 1969 obtained 145 at the P.U.C. and at the interview only 30 and the petitioner in W.P. No. 2262 of 1969 fared no better, because he obtained only 140 at the P.U.C. and 45 at the interview. W.P. Nos. 2173, 2509, 2510, 2262 and 2488 of 1969 are all dismissed. In the last petition we may mention that the candidate obtained 120 at the P.U.C. and 45 at the interview. There will be no order as to costs in W.P. Nos. 2173, 2352, 2262 and 2385 of 1969.

In W.P. Nos. 2352 and 2385 of 1969, the petitioners, before securing admission, should satisfy the Director of Medical Education that they belong to the Church of South India, by producing a certificate from the Protestant Bishop of Kanyakumari.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN, *Chief Justice.*

Miss Ruby Jacobs .. *Petitioner**

v.

A. Anthoniswami Udayar .. *Respondent.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *sections* 3 (2) (b) *and* 4—*Scope—Cultivating tenant—Unauthorised sub-lease—Question of fact—Sub-lease, total or partial, if necessarily results in cessation of cultivation.*

The Madras Cultivating Tenants Protection Act, 1955 does not make an unauthorised sub-lease by a cultivating tenant, a ground for eviction by the landlord. On the contrary, section 3 (2) (*b*) is confined in its operation to a cultivating tenant who has done " any act or.........any negligence which is destructive of, or injurious to, the land or any crop thereon, or has altogether ceased to cultivate the land." Certainly, a total sub-lease, or perhaps even a partial sub-lease, may have the effect that the concerned tenant (lessor) altogether

* C.R.P. No. 1747 of 1966. 22nd August, 1968.

ceases to cultivate the land, either in whole or in part. But, obviously, this is a question of fact, for the simple reason that the Legislature has thought it fit to make the ground for eviction depend, not on possession in the legal sense, but on actual cultivation or cessation of cultivation. Notwithstanding, the terms of a sub-lease, the cultivation may be jointly carried out by the two parties, and it is for the landlord to establish clearly, on the facts, that the tenant "has altogether ceased to cultivate the land," either in whole or in part, by virtue of the sub-lease. There is no presumption in law that the mere fact of execution of a sub-lease justifies an inference that there is cessation of cultivation on the part of the tenant.

Petition under section 6-B of the Cultivating Tenants Protection Act, Madras Act (XXV of 1955) read with section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the Special Deputy Collector, Revenue Court, Tiruchirappalli, dated 28th February, 1966 and made in P. No. 569 of 1965.

P. S. Srisailam, for Petitioner.

N. Sivamani, for Respondent.

The Court made the following

ORDER.—This revision proceeding involves an issue of some interest, but, while I think that it is desirable to lay stress upon one aspect of interpretation of statute law, the case itself admits of a disposal purely on findings of fact. The revision petitioner is the landlady, who sought eviction of the tenant under section 3 of the Madras Cultivating Tenants Protection Act, 1955 on two grounds, *viz.*, (1) default in payment of arrears of rent and (2) an unauthorised sub-lease of a part of the holding. The first ground failed, and it is not now being pressed before me.

As regards the second ground, the finding of the Court below is that the alleged sub-lease was not satisfactorily established. But the learned Counsel for the revision petitioner, when the point was put to him, did concede that an unauthorised sub-lease *per se* is not a ground for eviction under section 3 (2) (*b*) of the Act whatever might be the case with regard to the other parallel or analogous enactments. This Act does not make an unauthorised sub-lease by a cultivating tenant, a ground for eviction by the landlord. On the contrary, as is well known, section 3 (2) (*b*) is confined in its operation to a cultivating tenant who has done

> " any act or................any negligence which is destructive of, or injurious to, the land or any crop thereon, or has altogether ceased to cultivate the land."

It is not claimed that a sub-lease *per se* is an act which is destructive of, or injurious to, the land. But it is argued that a sub-lease *per se*, even of a part of the holding will imply that the tenant has " altogether ceased to cultivate the land" at least to the extent of that sub-leased property, and hence is liable to eviction.

The matter is not *res integra*, and my attention has been drawn to the decision of Srinivasan, J., in *Venkatarama Iyer* v. *Asan Md. Rowther*[1]. In that case, the finding of the learned Judge that no relief as against the sub-lessee is available to the landlord, under the Act, does not now concern us. Apparently, subsequent to this decision and other decisions to the same effect, the Act was amended by an Explanation to section 2 (Definitions), sub-clause (2) (*iii*) to the effect that " a sub-tenant shall be deemed to be a cultivating tenant of the holding under the landlord if the lessor of such sub-tenant has ceased to be the tenant of such landlord." That does not concern us in the present context.

But Srinivasan, J., went further and observed, that, by virtue of such sub-lease, the tenant may render himself liable to eviction " under section 3 (2) (*b*) of the Act." There is no further discussion, and the learned Judge does not state whether a mere demise as a sub-lease *per se* would imply, necessarily, that the tenant " has

1. (1961) 2 M.L.J. 277.

altogether ceased to cultivate the land." Apparently, he was of the view that, since a sub-lease does imply that the tenant (lessor) parts with possession to the extent of the sub-lease in favour of the sub-tenant, this part of section 3 (2) (*b*) would be attracted to a situation of that kind.

In *Perumal Muthiriar* v. *Ramachandra Iyer*[1], Ramachandra Iyer, C.J., follows this decision and comes to the conclusion that " even if a cultivating tenant grants a sub-lease of a part of what has been demised to him, he would be liable for eviction under the provisions of section 3 (2) (*b*) read with section 4."

Both these decisions do not refer into any discussion of the principle that a sub-lease *per se* is not any ground for eviction under section 3 (2) (*b*) of the Act. Both are clearly based on the reasoning that a consequence of the sub-lease would be, that the tenant (lessor) parts with possession of the holding in whole or in part, and is thus a person who " has altogether ceased to cultivate the land ". With great respect, I am of the view that, while I certainly do not intend to differ from this reasoning of the learned Judge and the learned Chief Justice in any way, the question is not a question of law, but primarily a question of fact. Certainly, a total sub-lease, or perhaps even a partial sub-lease, may have the effect that the concerned tenant (lessor) altogether ceases to cultivate the land, either in whole or in part. But obviously, that is a question of fact, for the simple reason that the Legislature has thought it fit to make the ground for eviction depend, *not on possession in the legal sense, but on actual cultivation or cessation of cultivation.* It is conceivable, for instance, that a sub-lease may be drawn up or effected, between the parties. Nevertheless, it may not materialise, and the tenant (lessor) may continue in cultivation of the entire holding, or the concerned part. Again, notwithstanding the terms of a sub-lease, the cultivation may be jointly carried out by the two parties, and, it is for the landlord to establish clearly, on the facts, that the tenant " has altogether ceased to cultivate the land ", either in whole or in part, by virtue of the sub-lease. There is no presumption in law that the mere fact of execution of a sub-lease justifies an inference that there is cessation of cultivation on the part of the tenant.

In the present case, on the facts, the case is far stronger against the landlady. Actually, the landlady was quite unable to prove the alleged sub-lease. She relied on some statement in a prior deposition, relating to a prior period, in which the tenant had admitted that there was a lease of a part. That statement was not made with reference to the present petition for eviction, or the period to which this petition relates ; in that sense, it is not even relevant, leave alone the fact that it is not conclusive. There is another admission that a certain named individual was cultivating somewhere in this holding. But that matter was not pursued further. That man might have been a partner of the tenant or a person who was working under the tenant's directions, and the Court cannot merely infer a sub-lease from an admission of this kind. On the merits, therefore, there is no room whatever for interference in revisional jurisdiction in this case. The revision petition is accordingly dismissed. No order as to costs.

V.M.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

R.P. David and others .. *Appellants**

v.

M. Thiagarajan and others .. *Respondents.*

Lunacy Act (IV of 1912)—Jurisdiction of Court under—Nature of—Proceedings under—If could continue after the death of the lunatic.

The jurisdiction of the Court in lunacy proceedings ceases on the death of the lunatic. Proceedings in relation to the estate of a lunatic in the Court of Protection

1. (1963) 2 M.L.J. 205.

*A.A.O.Nos. 391, 392, 393 and 394 of 1967. 16th October, 1968.

in general abate on the death of the patient and there is nothing in the Lunacy Act which could enable the Court to continue the proceedings.

Where the District Court gave certain directions to the manager of the estate of a lunatic to invite offers for sale and pending the proceedings the lunatic died, the Court could have no further jurisdiction in regard to the matter and the manager will have no *locus standi* to continue to represent the lunatic who is dead.

Rama Kamath v. *C.L. Lobo*, (1943) 1 M.L.J. 22 (2); Halsbury's Laws of England Volume 29 (third Edition) para. 1094 at page 600, referred to.

Appeals against the order of the District Court, Salem, dated 27th December, 1963 and made in I.A.Nos. 402 of 1962 and dated 5th November, 1964 and made in I.A. Nos. 383 of 1964 and respectively in O.P.No. 34 of 1959.

R. Gopalaswamy Iyengar and *C. Harikrishnan*, for Appellant in A.A.O. No. 391 of 1962, and for the 3rd Respondent in A.A.O. Nos. 392, 393 and 394 of 1967.

V. K. Thiruvenkatachari for *N. Maninarayanan*, for Appellant in A.A.O.Nos. 392 and 394 of 1967 of the 1st Respondent in A.A.O.Nos. 391 and 393 of 1967.

Irvins Asram for *Pias Lobo* and *Alwares*, for Appellant in A.A.O. No. 393 of 1967 and for 3rd respondent in A.A.O. No. 391 of 1967.

The Judgment of the Court was delivered by

Sadasivam, J.—These connected Civil Miscellaneous Appeals arise out of the order of the District Judge, Salem in I.A. No. 402 of 1962 and I.A.No. 383 of 1964 in O.P.No. 34 of 1959 in the lunacy proceedings in the matter of Miss Mary Holwall Short. A certain coffee estate called Riverdale Estate belonged to two sisters, the aforesaid Miss Mary Holwell Short, the lunatic and Miss Alice Edith Short. G.F. Muirhead and Rev. E.L. Poyser were appointed managers in the lunacy proceedings to manage the estate of the said Miss Mary Holwell Short, who was adjudged lunatic in the said O.P. No. 34 of 1959 District Court, Salem. The managers so appointed were not in a position to manage the estate and they considered it best to sell the same. Miss Alice Edith Short also agreed to convey her share to the person to whom the lunatic's share was to be sold, in order to secure the best available price. One David made the highest offer of Rs. five lakhs within the time notified for making the offer and complied with the conditions of sale. But when the matter came up before the District Court, one Thiagarajan offered Rs. 5,000 more than the offers made by David, and that was accepted by the learned District Judge. Aggrieved by this order, David filed revision petitions in this Court in C.R.P. No. 1634 and 1635 of 1962. Jagadisan, J., set aside the orders of the District Judge and dismissed I.A. No. 401 of 1962 filed by Thyagarajan to accept his offer and directed I.A. 402 of 1962 to be restored to the file, and ordered the District Judge, to hold an enquiry as required under section 75 (2) of the Indian Lunacy Act and if he is satisfied that the market value of the estate is substantially more than Rs. 5 lakhs, to give further directions to the managers of the estate of the lunatic either to call for fresh offers or to hold a public auction. In pursuance of the said order, the District Judge made an enquiry and passed an order on 27th December, 1963 and adjourned the application to enable the managers, to give further particulars about the offers that might be available. David has preferred C.M.A. No. 391 of 1967 complaining that the learned District Judge has failed to give importance to the circumstance that the Managers made their application in I.A. No. 402 of 1962 on 18th August, 1962 to accept his offer of five lakhs and stood by it even after Thiagarajan's offer of Rs. 5,000 more had been made to Court. Thiagarajan has filed C.M.A. No. 392 of 1967 alleging that the Court has jurisdiction under the Lunacy Act only over the property of the lunatic and the consent given by the non-lunatic sister will not confer jurisdiction on the Court to deal with her property. In C.M.A. 393 of 1967 one of the managers of the lunatic seeks to revise the order of the District Judge in I.A. No. 383 of 1964 ordering refund of the sum of Rs. 2,25,000 deposited by Thiagarajan after retaining Rs. 27,500 out of it. According to the appellant in C.M.A.No. 393 of 1967, the entire amount of Rs. 2,52,500 should be retained as the said Thiagarajan has taken possession of the

estate which was ordered to be sold and he has not surrendered possession of the same. Thiagarajan in his turn has filed C.M.A. No. 394 of 1967 objecting to the retention of the sum of Rs. 27,500 out of the amount deposited by him.

It is now brought to our notice that the lunatic died during the pendency of these C.M.As. and her sister has succeeded to the estate of the said lunatic. In view of this fact, the advocates appearing on both sides in these C.M.As. did not dispute the fact that the jurisdiction of the District Court under the Indian Lunacy Act has come to to an end.

In *RamaKamath* v. *C L Lobo*[1], it was held on a consideration of the provisions of the Lunacy Act that the right of action for a claim for rent the periods subsequent to the death of the lunatic would vest in the heir entitled to take the property after the death of the lunatic, and therefore the Court has no jurisdiction to sanction the institution of proceedings and the Manager has no right to maintain the suit after the death of the lunatic. The principle of the said decision is clearly supported by the passage at page 600 para. 1094 in Volume 29 of Halsbury's Laws of England 3rd Edition wherein it is stated that the proceedings in the Court of Protection are in general abated on the death of the patient. The Two English decisions which clearly affirm this principle are *Greenwood* v. *Bennett*[2], and In re *Wheater*[3]. In both these decisions it is pointed out that the jurisdiction of the Court in lunacy proceedings ceased on the death of the lunatic. There is nothing in the provisions of the Lunacy Act, which could enable the Court to continue the proceedings after the death of the lunatic. The District Court cannot therefore, deal with any offer that might have been made in pursuance of its order or sell the estate of the lunatic who is dead.

C.M.A. No. 391 and 392 of 1967 are therefore liable to be dismissed, and they are hereby dismissed. C.M.A. No. 393 of 1967 is also liable to be dismissed as the manager of the lunatic or her estate has no *locus standi* to continue to represent the lunatic who is dead. So far as C.M.A. No. 393 of 1967 is concerned, the appellant, Thyagarajan, cannot complain about the sum of Rs. 27,500 being retained in pursuance of orders of the District Judge in O.P. No. 34 of 1959 so long as he has not redelivered possession of the estate which he took as a result of his depositing the amonnt into the Court. It is brought to our notice that David who claims to have subsequently purchased the entire estate from the surviving sister has filed suits O.S.Nos. 184 of 1966 and 76 of 1967, Sub-Court, Salem, impleading Thiagarajan among others to recover possessions of the estate and for accounts. The amount of Rs. 27,500 is ordered to be transferred to the credit of the said suits to be dealt with in the light of the decision in the said suits. C.M.A. No. 394 of 1967 is also dismissed. There will be no order as to costs.

R.M. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice.*

Angappa Goundan .. *Petitioner**

v.

Kuppammal .. *Respondent.*

Succession Act (XXXIX of 1925), *section* 214 —*Hindu Succession Act (XXX of* 1956), *section* 3 —*Widow of deceased Hindu suing for recovery of amount due to her deceased husband—If should produce a succession certificate.*

The provisions of section 8 of the Hindu Succession Act, (XXX of 1956) does not have an overriding effect and does not supersede the provisions of section 214 of the Succession Act. Both the provisions could simultaneously apply as there is no conflict between them. Hence even a Hindu widow claiming to be the sole heir

1. (1943) 1 M.L.J. 22 (2).
2. L.R. (1913) 2 Ch. D. 318.
3. L.R (1928) 1 Ch.D. 223.

*C.R.P. No. 2190 of 1966. 17th October, 1968.

to the assets of her husband, who died intestate, under section 8 of the Hindu Succession Act is bound to produce a succession certificate under section 214 (1) (a) of the Succession Act when she brings forward a suit in a Court for recovery of the assets.

Basappa v. *Siddamma*, A.I.R. 1966 Mys. 198, referred to.

Petition under section 25 of the Provincial Small Cause Courts Act praying the High Court to revise the decree of the District Munsif Court of Dharmapuri in S.C.S No. 211 of 1966 dated 15th July, 1966.

V.S. Rangaswamy Iyengar, for Petitioner.

S.B. Faruluddin and *R. Balaguru*, for Respondent.

The Court delivered the following

JUDGMENT :—The short point that arises in this revision proceeding is whether a Hindu widow, claiming to be the sole heir to the assets of her husband, who died intestate, under section 8 of the Succession Act, 1956 (XXX of 1956), is bound to produce a succession certificate under section 214 (1) (a) of the Succession Act, when she brings forward a suit in a Court for a decree against the debtor of the deceased husband.

It is not necessary to refer to the matter in any great detail, for the point seems to be obvious, whether section 214 (1) (a) or section 214 (1) (b) is the relevant provision of law, that perhaps, by oversight, there has been no legislative amendment of section 214 making an exception in the case of a claim under section 8 of the Hindu Succession Act (Central Act XXX of 1955). The matter is not bare of authority. It came up, squarely in the form that it now arises, except for the distinction that that was a case of an execution of a decree already obtained under section 214 (1) (b), before a learned single Judge of the Mysore High Court in *Basappa* v. *Siddamma*[1]. The learned Judge held that the party could not proceed without the production of a succession certificate, and that there was no conflict between section 214 of the Indian Succession Act, and section 8 of the Hindu Succession Act, since both could simultaneously apply or be in force.

Of course, if the legislative intent was that persons claiming under section 8 of the Hindu Succession Act, need not produce a succession certificate when seeking to recover a debt due in the deceased person, or to execute a decree already obtained by such person, then, either section 214 should be suitably amended, or section 8 should be invested with a overriding or superseding effect. When that has not been done, the party is bound to produce the succession certificate in respect of the asset claimed. This is also for the protection of the debtor, since learned Counsel for the debtor states that some one else may, conceivably, claim to be heir of the deceased creditor along with the widow. I, therefore, allow the revision, set aside the decree and remit the suit for further trial according to law. Time may be granted to the plaintiff (respondent) to obtain and produce the succession certificate before the suit is finally disposed of. No costs.

R.M. *Petition allowed.*

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1. A.I.R. 1966 Mys. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

M. Varuvel Nadar, son of Mallayappa Nadar .. *Appellant**

v.

A. Varuvel Nadar, son of Anthonimuthu Nadar .. *Respondent.*

Res Judicata—*Defendant (ex parte) unaware of the contentions raised by his co-defendant and had no opportunity to contest the claim—Claim of the defendant to suit properties, recognised in the plaint itself—Claim of the defendant, if barred by* res judicata.

A defendant, who was not aware of the contentions raised by his co-defendant and therefore had no opportunity to contest the claim cannot be said to be barred by *res judicata* by reason of the decision rendered behind his back.

In the present case the plaint clearly recognised Mariamma's (one of the defendant's) right to the suit properties. There was, therefore, no reason for her to appear and contest. She was not running away from any question that arose out of the pleadings in the plaint. Merely because the second defendant chose to claim two thirds share in all the properties, of which Mariamma (who was *ex parte*) could not have been aware and that question was purported to be decided in an indirect way, it cannot be said that Mariamma's claim to the suit properties would be barred by *res judicata* and consequently the plaintiff's claim also would not be barred by *res judicata*. The plaintiff did not apprise Mariamma of anything that she need contest.

Appeal against the decree of the Sub-Court, Padmanabhapuram, in Appeal No. 311 of 1963 preferred against the decree of the District Munsif, Padmanabhapuram, in O.S.No. 517 of 1961.

P.S. Sarangapani Ayyangar, for Appellant.

T.R. Ramachandran, for Respondent.

The Court delivered the following

JUDGMENT:—The plaintiff is the appellant. He is a purchaser of the suit properties from P.W. 2, who had purchased them from one Mariamma, the daughter of one Devasahayam. This Devasahayam had four brothers, Mariaputhali, a Chanthanakurisu, Mariandran and Anthonimuthu. The defendant is the son of Anthonimuthu. Chanthanakurisu also had a son called Anthonimuthu, who had two sons. Siluvastian and Chanthanakurisu. Devasahayam, Chanthanakurisu and Anthonimuthu were admittedly entitled to 1/3rd share each in their family properties, as Mariaputhali and Mariandran seem to have died without any issues. Devasahayam sold to his brother Anthonimuthu a 1/4th share in the suit items 3 to 6. Therefore, he still had with him a 1/3rd share in items 1 and 2 and a 1/12th share in items 3 to 6. It is this which Mariamma sold to P.W. 2, and P.W. 2 sold to the plaintiff. Chanthanakarasu's grandsons, Siluvastian and Chanthanakurisu filed O.S. No. 98 of 1956 for partition and possession of their one-third share. To this suit all the members of the family were parties including Mariamma. Mariamma was *ex parte* in the suit. Though there was some dispute as to whether she had been served with summons in that suit, both the Courts below have held that she had been served with summons and we can proceed on the footing that she had been served with summons and had chosen to remain *ex parte*. At the same time the present defendant filed O.S.No. 68 of 1956, in which only Siluvastian and Chanthanakurisu, the grandsons of Chanthanakurisu were the defendants. Mariamma was not a party to that suit. Both the suits were tried together and the defendant got a decree for a 2/3rd share in all the items and not merely a 1/3rd share in tiems 1 and 2 and 7/12th share in titems 3 to 6 as he should have, because Anthonimuthu had purchased only a 1/4th share in items 3 to 6. Taking these into consideration the trial Court decreed the plaintiff's suit. But the lower appellate Court has taken the view that the decree

*S.A. No. 1558 of 1964. 24th October, 1968.

in the suit was *res judicata* in respect of the present suit and has allowed the appeal and dismissed the plaintiff's suit. The question therefore, is whether the decision in the previous suit O.S. No. 98 of 1956 is *res judicata* in this suit as held by the lower appellate Court.

I am clearly of opinion that the conclusion of the lower appellate Court on this point is wrong. The question as to the scope of the principle of *res judicata* as between the co-defendants has been decided by this Court in *Ramaswami Iyer* v. *Thambuswami*.[1] In that case the learned Chief Justice delivering the judgment of the Full Bench refers with approval to the rule laid down by Vice-Chancellor Wigram in the leading case of *Cottingham* v. *Earl of Shrewsbury*[2], which is as follows :—

> "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case and the co-defendants will be bound. But, if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as .... between each other by proceeding which may be necessary only to the decree the plaintiff obtains."

The effect of this decision was considered by a later decision of a Bench of this Court in *Gopala* v. *Gopalakrishna*[3]. In that case *A* filed a suit against *B*, a tenant for possession and rent and joined *B* and *C* as co-defendants. In that plaint *A* admitted that the property belonged to *A*, *B* and *C*. *B* contested that *C* had no interest in the property. *C* remained *ex parte*. The suit was decreed and possession also decreed in favour of *A* and *B* in two equal shares. Later on *C* sued *A* and *B* for partition, ascertainment, and delivery of one-third share in the property. The defence was that the decision in the previous suit was *res judicata*. It was held that the suit was not so barred. In discussing this question Srinivasa Aiyangar, J., referred to the Full Bench decision of this Court and then proceeded to be observed as follows, at page 632 :

> "It follows from the rule accurately stated as above, that before there can be any adjudication between co-defendants operating as *res judicata* a conflict must have arisen between them. Such conflict might no doubt arise in one of two ways. It might arise as the direct result of the manner in which the plaintiff has set out his case in the plaint. It might also arise as between the defendants themselves in the course of pleadings in answer to the plaintiff's case. Again in the latter class of cases the determination of the conflict as between co-defendants might or might not be necessary for the determination of the plaintiff's claim. The rule obviously seems to be that it is only when the determination of the question as between co-defendants is necessary for the determination of the plaintiff's claim that the decision as between co-defendants would operate as *res judicata*. Otherwise, that is to say, if such determination as between co-defendants were not necessary for the decision of the plaintiff's case, it is clear that such decision would not operate as *res judicata* for the simple reason that it is on a question which, to adopt the language employed in section 11, Civil Procedure Code, is though substantially not directly in issue. It would thus be clear that whenever the contest between co-defendants is not indicated and included in the plaintiff's action itself, then it follows that for the purpose of a decision operating as *res judicata* as between co-defendants there must have been actually a conflict or issue raised as between them, and that such conflict or issue must have been necessary for the determination of the plaintiff's cause or claim. .... From these considerations it is clear that as the plaintiff in this case was under no obligation to appear in the previous suit having regard to the suit as laid and as no issue was raised as between co-defendants, the rule of *res judicata* cannot apply."

Jackson, J., observed as follows :—

> "No mystery attaches to the principle of *res judicata*. If a matter has been directly and substantially in issue in a former suit between the same parties, and has been finally decided, that decision will be treated as final in a subsequent

1. A.I.R. 1922 Mad. 452 (F.B.).
2. (1843) 3 Hare 627 : 15 L.J. Ch. 441.
3. A.I.R. 1928 Mad. 630.

trial, with due regard to the competence of the Courts. If a plaintiff raises an issue in his plaint, and a defendant runs away from it by remaining *ex parte*, that defendant gives up his case, and the Court will finally decide it against him. But, if, apart from the plaint which has been served upon such defendant, new matter is brought in, either by way of amending the plaint or by way of written statements from other defendants, the defendant, who has remained *ex parte* cannot be said to be running away from issues of which he has never heard. It would be odd to say that such matter has been directly and substantially in issue between the parties where it is perfectly obvious as a matter of fact that between these parties it has never been in issue at all. The contrary position can only be established by assuming that a party, once he is given notice of a suit must keep himself informed of every subsequent development even though the plaint apprised him of nothing that he need contest. No case, and certainly no rule of procedure has ever laid such a duty upon parties, and were this law, it would follow as a natural corollary that every party must be served with every written statement and every amendment of the plaint."

Now applying this principle let us see how the matter stands in this case. In O.S. No. 98 of 1956 the plaintiff was claiming his 1/3rd share. In paragraph 8 of the plaint he had stated that excluding any of the properties of Devasahayam's 1/3rd share conveyed by him to Anthonimuthu the rest had devolved on his daughter Mariamma. He then went on to say excluding the plaintiff's share the balance of 2/3rd share belongs to the defendants. It is therefore clear that Mariamma's claim to the present suit properties was specifically recognised in the plaint itself. Apparently, in that case the present defendant claimed that he was entitled to the whole of 2/3rds. The judgment in O.S. No. 98 of 1956 proceeds to state as follows :

"This suit and O.S. No. 68 of 1956 are tried together and heard together. Plaint items 1 to 6 in this suit are also items 1 to 6 in that suit. It is found in that suit that the 2nd defendant in this case is entitled to 2/3rd share of the plaint items 1 to 6 and that the plaintiffs in this suit are entitled to 1/3rd of those items and not 1/4th as contended by these defendants."

Paragraph 6 is as follows :—

"It is found in the connected case that the plaintiffs in this suit are entitled to one-third of the plaint items 1 to 6 and that the plaintiff therein who is 2nd defendant in the case is entitled to 2/3rd share in these items."

Paragraph 10 ultimately concludes as follows :—

"In view of my finding on issues 1 to 6, I find that plaintiffs are entitled to a decree for partition of one-third share in the plaint A items 1 to 9 only........I therefore pass a preliminary decree (*a*) for partition of the plaintiffs one-third share in items 1 to 9 of A schedule........"

The other clauses are not relevant. Notwithstanding this the final decree that was passed in this case allotted a one-third share to the plaintiffs in O.S. No. 98 of 1956 and two thirds share to the 2nd defendant in that suit, that is the present defendant. It would be seen that this case exactly fits in with the principle laid down in *Gopala* v. *Gopalakrishna*[1]. The plaint clearly recognised Mariamma's right to the suit properties. There was, therefore, no reason for her to appear and contest. She was not running away from any question that arose out of the pleadings in the plaint. Merely because the present second defendant chose to claim two-thirds share in all the properties, of which Mariamma could not have been aware and that question was purported to be decided in an indirect way, it cannot be said that Mariamma's claim to the suit properties would be barred by *res judicata* and consequently the plaintiff's claim also would not be barred by *res judicata*. The plaintiff in the words of Jackson, J. did not apprise Mariamma of anything that she need contest.

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1. A.I.R. 1928 Mad. 630.

On behalf of the respondents reliance is placed upon the decision in *Harihar Prasad* v. *Narasing Prasad*[1]. It is urged that a suit for partition if different from other suits, that in a suit for partition each defendant is also a plaintiff if he claims his own share and that therefore the claim by the present defendant as second defendant in O.S. No. 98 of 1956 when it was decided in his favour would be *res judicata* as against his co-defendants, that is Mariamma. The relevant passage in the report is found at page 87 of the report. It is as follows :

> " It must be remembered that a partition suit may be one of two kinds, namely, a suit for imperfect partition or a suit for perfect partition. Order 20, rule 18, Civil Procedure Code, expressly empowers a Court in a proper case to pass a decree for perfect partition of the property....The rule undoubtedly gives the Court in a proper case power to separate not only the plaintiff's share but also the other shares of other defendants interested in the property. In practice defendants in a partition suit frequently ask that their share should be partitioned, and the present defendants first party in the partition suit made such a prayer. If the Court is asked by defendants as well as the plaintiff in a partition suit, to separate their shares, the Court will do so; and in order to do so, it must ascertain the respective shares of the parties. In such a case each of the defendants stands in very much the same position as the plaintiff. He is a defendant *vis-a-vis* the plaintiff in the suit, but he is also a plaintiff *vis-a-vis* the plaintiff and his co-defendants in so far as he asks for the ascertainment of his share and the granting of a patti proportionate to it. In this respect a partition suit differs very materially from an ordinary title or money suit. This distinction has been noticed by Courts in India in a number of cases........... Where defendants in a partition suit pray for a partition of their share, then before such relief can be given to them, their share must be ascertained. In such a case there is obviously a conflict of interest between the defendants and between that particular defendant and the plaintiff. A defendant who asks for partition of his share is entitled to such relief, and when a decree is drawn up he can take steps to enforce such a decree in much the same manner as if he was a plaintiff".

It is this passage that is relied upon on behalf of the respondent. The Bench referred to the Madras decision in *Gopala* v. *Gopalakrishna*[2], and particularly to the observations of Jackson, J., extracted above, and then observed as follows at page 89:

> " It is to be observed that a decision on the claim of the co-defendant in this case was unnecessary to grant the plaintiff relief. The original suit was not one for partition, and it therefore differs very materially from the case now before the Court. As I have stated earlier, in a partition suit each defendant interested in the property can himself claim partition, and if he does so the Court must first ascertain his share and then grant partition of that share. In ascertaining the share of the defendant who claims partition, the Court must adjudicate on the rights of the various defendants. A defendant in a partition suit must be deemed to be aware of such a possibility whenever a partition suit is instituted. In such a case if the defendant does not appear, he cannot afterwards challenge the decision as to the share of the various parties arrived at in that partition suit."

There was an earlier Bench decision of the same Court in *Latif Hussain* v. *Basdeo Singh*[3], That was a case where in a partition suit one of the defendants, *T*, filed written statement stating that the extent of her proprietary share was correctly stated in the plaint and that she too desired partition; three months later the other defendants put in a written statement contesting the suit on various grounds, and incidentally claiming that in addition to their proprietary share as stated in the plaint, they held a one anna mokurari right under *T*. There was nothing to show that this claim to a mokurari was brought to the notice of *T*, who was not contesting

1. A.I.R. 1941 Pat. 83.
2. A.I.R. 1928 Mad. 630.
3. (1917) 39 I.C. 859.

the partition suit. An issue was framed on the subject of the mokurari but was subsequently expunged. The effect of the final decree for partition, however, was to give the contesting defendants possession of the one anna they claimed under the mokurari. In a subsequent suit, it was held that the question of mokurari was not *res judicata* between the representatives of T and the other defendants to the partition suit, inasmuch as (1) the question was not raised in that suit except as between the plaintiff in that suit and the contexting defendants, there being nothing to show that *T* was cognisant of the claim; (2) the preliminary judgment in the partition suit stated that the issue as to the mokurari claim was expugned, (3) the question was not expressly decided; and it could not be held that a decision might and ought to have been obtained in the partition suit by *T*.

It will be noticed that this decision also fits in with the facts of this case. In discussing the question the Bench stated as follows at page 262:

"................the question was not raised in that suit at all except between Yakub Hussain who was seeking a partition in that suit and the present defendants, for the present defendants did not put in their claim to the mokarari in that partition suit until three months after Mst. Tamizan (T) and her daughters had put in their written statement saying that they did not contest (the defendants have failed to make out that Mst. Tamizan was aware, of the claim of mokarari made in their subsequent written statement."

This earlier decision of the same Court was not noticed by the learned Judges, who decided the later case in *Harihar Prasad* v. *Narsing Prasad*[1], nor did they, seek to distinguish it. The principle laid down by the earlier Patna decision and the decision in *Gopala* v. *Gopalakrishna*[2]; accord with common sense and requirements of justice. A defendant, who was not aware of the contentions raised by his co-defendant and who, therefore had no opportunity to contest, that claim cannot be said to be barred by *res judicata* by reason of the decision rendered behind his back. I think it is too much to say, as the learned Judges in *Harihar Prasad* v. *Narsing Prasad*[1], did that a defendant in a partition suit must be deemed to be aware of such a possibility whenever a partition suit is instituted. It is in contemplation of such a contingency that Jackson, J., stated that no case, and certainly no rule of procedure, has ever laid a duty on parties to keep themselves informed of, every subsequent development, even though the plaint apprised them of nothing that they need contest. As a matter of fact, in *Harihar Prasad* v. *Narsing Prasad*[1], actually the decision itself proceeds on the footing that there was a conflict of interests between co-defendants in the earlier suit and there was an express decision against the contesting defendants. I am therefore satisfied that in this case there is no question of the earlier judgment operating as *res judicata*.

I may also refer to the decision in *Chandu Lal* v. *Bibi Khartemonnesa*[3], where it was held as follows:

"Where the plaint itself in a prior suit did not raise any conflict between the co-defendants and a defendant did not appear, but a co-defendant appeared and claimed an interest conflicting with the interest of the absentee defendant, the decision, if any, on the point cannot operate as *res judicata*, unless the absentee defendant gets notice of the conflict. In such circumstances the matter cannot be said to have been heard and finally decided so as to bind the parties. If, however, the pleadings on record, no matter whether the co-defendants pleaded anything *inter se* or not, should raise the conflict of interest as between the different sets of the defendants the requisite condition that there must be a conflict of interest between the defendants concerned shall be satisfied."

In this case the pleadings on record did not raise any conflict of interest between the different sets of defendants. This decision was also in a partition suit and supports the contention of the appellants. I should mention at this stage that the

1. A.I.R. 1941 Pat. 83.
2. A.I.R. 1928 Mad. 690.
3. A.I.R. 1943 Cal. 76.

respondents also relied upon a decision of Somayya, J., in *Ramamani* v. *Basavayya*[1], In that case it was observed as follows:

> "In a partition action the sharers are both the plaintiffs and the defendants, and each defendant sharer is also in the position of a plaintiff. Where one of the defendants in fact applies for a decree in respect of his share, and the alienees are arrayed as co-defendants, the decision operates as *res judicata* and cannot again be reopened in a subsequent suit between the particular defendant whose share was the subject of decision and the alienee-defendants."

To this observation no objection could be taken. In that case there was a conflict between the contesting defendant and the contesting alienee-defendants and a decision had been given. Naturally in a subsequent litigation the earlier decision is *res judicata*. That was not a case where one of the defendants was absent, and the decision in respect of a contention raised by a co-defendant as a consequence of which a decision was given against the absentee-defendant was claimed to be *res-judicata*. However, the learned Judge referred to the decision in *Harihar Prasad* v. *Narasing Prasad*[2], which really was not necessary for the decision of the case before him. The earlier decision of the Patna High Court was apparently not brought to his notice. In any case the decision of Somayya, J., in *Ramamani* v. *Basavayya*[1], does not support the contention of the respondents. The result is, that, the lower appellate Court having decided the case only on the question of *res judicata* and not having considered the other questions that arise in this case, the second appeal will have to be allowed and the lower appellate Court directed to restore A.S. No. 311 of 1963 to its file and dispose of its on the other questions that arise in the appeal. The appellant will get a refund of Court-fee paid in this case. Costs of the appellant in the second appeal will abide and be provided for in the fresh decree to be passed by the lower appellate Court. No leave.

V.M.K. *Appeal allowed; matter remitted.*

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1. (1946) 2 M.L.J. 321.
2. A.I.R. 1941 Pat. 83.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE T. RAMAPRASADA RAO AND MR. JUSTICE P. R. GOKULAKRISHNAN.

The Joint Registrar of Co-operative Societies, Madras Region, Chepauk, Madras-5 and others ... *Appellants**

v.

P. S. Rajagopal Naidu and others ... *Respondents.*

Interpretation of Statutes—Rules of—Ambiguous penal provision of an enactment—Ascertainment of the legislative intent—Title of the Act, if could provide assistance for harmonious interpretation.

Interpretation of Statutes—Rules of—Two or more sections appearing together and in the same context—Each section and the action contemplated therein lending colour to the other section—Provisions if should be understood in their cognate sense.

Madras Co-operative Societies Act (LIII of 1961)—'Supersession'—Meaning of—Vesting of power in a statutory tribunal—Duty of the tribunal —Substatinal justice to be meted out.

Madras Co-operative Societies Act (LIII of 1961), section 72—Interpretation—Power to dissolve the committee of any registered society—Opinion of the Registrar, if essentially subjective—Scheme of sections 64 (audit) 65 (inquiry) and 66 (inspection), if constitute jurisdictional fact—Elected body, if could be superseded without applying an objective standard—Intial hypothesis, a condition precedent.

Madras Co-operative Societies Act (LIII of 1961), section 72—Scope—Committee of the registered society, a permanent body—Change in the personnel, if effects a consequential change in the statutory body—Commission and omission of the previous committee, if can be mechanically attributed to the succeeding committee.

The Joint Registrar of Co-operative Societies issued a notice of supersession, purporting to supersede, under section 72 of the Madras Co-operative Societies Act, 1961, the Committee in charge of a Co-operative Society in Vellore. He was of the view that the committee of the society was not functioning properly and failed to discharge its duties and responsibilities. Notwithstanding the explanation of the Committee that the order of supersession without fuller enquiry would be illegal, the Joint Registrar, with a view to set right the affairs of the society and to safeguard the interests of the share-holders and the creditors of the Society and to place the Society on a satisfactory basis, dissolved the Committee.

Is the order of supersession sustainable in law?

Held : The question turns on the scope and content of section 72 of the Act.

The title of the Act, though not conclusive, is one of the numerous sources from which assistance may be obtained in the ascertainment of the legislative intent of an enactment. Even so is the "Co-operative Societies Act". If therefore there is some ambiguity in the application of a particular section of the Act, which is penal in character to a particular set of material facts, the title provides ample and singular assistance to interpret the particular section in harmony with and in conformity, to the other allied provisions therein.

From the scheme of the Act and the primordial purpose and intendment of the Act it appears that the Registrar of Co-operative Societies is constituted as a vigilant sentinel to look to the proper working and functioning of co-operative societies created and registered under the Act, and though certain powers are vested in him in relation to such supervisory jurisdiction yet such powers though *prima facie* exercisable on his subjective satisfaction they have to

* W.. P. Nos. 296 and 297 of 1969. 8th October, 1969.

pass muster objectively as well and should conform reasonably with the reality of the situation. A committee of management, in so far as a co-operative society is concerned, is the sole body to which is entrusted the affairs of the said society. It is important to note that when the Registrar of Co-operative Societies or any officer authorised in that behalf by the statute intends taking any action against a member of the society or a member of the committee or against the society as a whole, it appears from the scheme of the statutory provisions that an audit under section 64 or an inquiry under section 65 or an inspection under section 66 is a necessary concomitance and the report or material obtained on such audit, inquiry or inspection form as it were the foundation or bedrock for the supervening action, whatever the nature of such action may be, which is to be undertaken by the Registrar.

In each of those sections, it is incumbent on the Registrar to give an opportunity to the member concerned, officer concerned or the society concerned to rectify the defects. If this much is clear and unambiguous, the intention of the Legislature whose purpose is to advance co-operation and suppress bureaucracy, then it cannot be lightly predicated that if the Registrar forms an opinion *aliunde* or otherwise than on an audit report, inquiry report or inspection report, the jurisdictional fact which has to be found by the Registrar before he attempts to exercise his statutory powers under the Act is available to him. Under the scheme of the Act the condition precedent to the exercise of jurisdiction by the Registrar under one or the other of the above sections and in particular section 72 is to secure an audit memorandum or a report of inspection or inquiry, so that he may be provided with the necessary material to act thereon. Unless such a fact finding authority has provided the Registrar with the hypothesis to act and ultimately supersede an elected body, the impugned order of supersession will undoubtedly be tainted with the absence of a jurisdictional basis. Whether such a basis exists, is subject to review by the Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

'Supersession' means to make the existing things inefficacious by exercise of superior power; such a power if vested in a statutory tribunal it should exercise it in a judicious spirit and primarily to render substantial justice. The decision should be arrived at by such a tribunal which is ordinarily characterised as one vested with a quasi-judicial functions in a spirit and with a high sense of responsibility in order to mete out justice ultimately.

Section 72 ought not to be read and interpreted in the abstract *de hors* the intent and purport envisaged in the prior sections, which form part and parcel of the same chapter. When two or more sections appearing together and in the same context are susceptible of analogous meaning, they are to be understood in their cognate sense. Each section and the action contemplated therein lend colour to the other section and it is on such cumulative understanding of the sections and their application, that the tribunal empowered to brand a committee as inefficacious, should act and act judiciously as well after giving an effective opportunity to the committee to rectify the defects.

The section, however, speaks of the opinion of the Registrar, which is essentially subjective in nature. It is to be remembered, however, that the result of the action taken under section 72 would make a statutory functionary dormant. In such circumstances, it is to be considered whether mere and bare subjective information of the Registrar can prevail and no standard of objectivity is any more required for the exercise of such power. Section 72 contemplates that the intitial hypothesis necessary to enable the Registrar to act under it is that the society is not functioning properly. There is absolutely no material whatsoever to hold that the committee in this case has wilfully disobeyed or wilfully failed to comply with the lawful order or directions of the Registrar under the Act or the Rules. In the instant case, however, not only the principles of natural justice have been violated but the Registrar assumed jurisdiction without the hypothesis essential for him to deal with in the circumstances of this case and such exercise of power by a quasi-

judicial tribunal has to be set at naught as its acceptance would be to encourage arbitrariness and throw overboard principles of natural justice.

Once it is not disputed, as it is indisputable, that the committee as a statutory body is a permanent and a continuous one, then it cannot be said that any change in the personnel of the committee would effect a consequential change, in any manner whatsoever, in the statutory body as such. If such a limited scope and interpretation is to be given to such a statutory functionary, then it would cease to be a permanent body. Once it is conceded that the body is a legal entity with continuous existence to say that the acts of commission and omission of the previous committee cannot be mechanically attributed to the succeeding committee unless there is a link between the act and the person or persons constituting the committee would be to whittle down the pronouncement made that the body is a permanent and a continuous one. Indeed, such a wedging into its legal character for any purpose, is irreconcilable. "Once permanent, always permanent," can have no exception.

Appeals under Clause 15 of the Letters Patent against the Order of The Honourable Mr. Justice Alagiriswami dated 28th July, 1969 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 1744 and 1951 of 1969 presented under Article 226 of the Constitution of India to issue writs of *certiorari* calling for the records relating to the proceedings of the 1st respondent in R. C. No. 36818/68 D-1, dated 11th April, 1969 and of the 2nd respondent in the proceedings, R. C. No. 49021/69/J-2, dated 13th June, 1969 confirming the order of the 1st respondent respectively and quash the order made therein.

The writ appeals first came on for hearing before K. Veeraswami, C. J. and Gokulakrishnan, J.

Government Pleader, on behalf of the Appellants.

D. Munikanniah, for *R. D. Indrasenan* and *N. Rajendran*, Advocates, for Respondents.

The Order of the Court was made by

Veeraswami, C. J.—Section 72 of the Madras Co-operative Societies Act, 1961 calls for interpretation. A Division Bench of this Court in Writ Appeal No. 113 of 1969, has taken a particular view of the scope and effect of it, with which, *prima facie*, with due respect, we do not find ourselves in agreement. The question is one of importance and will affect all the co-operative societies in the State. We consider, therefore, that the matter should be placed before a Full Bench for decision.

Post on 8th September, 1969.

In pursuance of the aforesaid order, the writ appeals came on for hearing before the Full Bench.

The Advocate-General, assisted by the Government Pleader, on behalf of the Appellants in both the appeals.

D. Munikanniah for *R. D. Indrasenan* and *N. Rajendran*, Advocates for the Respondents in each of the petitions.

The Order of the Court was pronounced by

Ramprasada Rao, J.—These Writ Appeals are directed against the common judgment in W. P. Nos. 1744 and 1951 of 1969 rendered by Alagiriswami, J. In the first instance it came up before a Division Bench consisting of my Lord the Chief Justice and Gokulakrishnan J. The Division Bench felt it desirable to place the matter in question arising in these appeals before a Full Bench and observed:—

"Section 72 of the Madras Co-operative Societies Act 1961, calls for interpretation. A Division Bench of this Court, in Writ Appeal No. 113 of 1969, has taken

a particular view of the scope and effect of it, with which, *prima facie* with due respect, we do not find ourselves in agreement. The question is one of importance and will affect all the co-operative societies in the State. We consider, therefore, that the matter should be placed before a Full Bench for decision."

The subject having been set once again for hearing before us, we are called upon in the main to consider the scope and content of section 72 of the Madras Co-operative Societies Act, 1961, hereinafter referred to as the Act.

A few relevant facts touching upon the matter in issue may be noticed before the scheme of the Act, its purpose and intendment are considered. On 4th January, 1969, the Joint Registrar of Co-operative Societies issued a notice of supersession, purporting to supersede, under section 72 of the Act, the committee in charge of a co-operative society by name The North Arcot District Co-operative Supply and Marketing society Limited ,Vellore. In the said notice certain charges were framed and it was sought to be made out that the Society was not functioning properly for some time past and the committee in management of the affairs of the Society was called upon to explain why it should not be superseded. The committee showed cause by submitting its due explanation to as many as ten charges framed against it. The Joint Registrar was of the view that the Committee of the Society was not functioning properly and failed to discharge its duties and responsibilities. The committee explained that many of the charges which relates to deficits in the main society or its associates, reflected on the day-to-day administration of the Society, which is mainly in the hands of a paid wholetime Secretary of the rank of a Deputy Registrar of Co-operative Societies in the service of the Co-operative Department of the Government of Tamil Nadu and the other members of the staff, that no irregularity was brought to its notice by the Secretary or any member of the staff, that if there was any commission or omission at all, it was attributable to the chief executive officer of the Society, and that in the absence of proof of lack of good faith or the presence of an oblique purpose in the minds of the committee as a whole, the order of supersession without a fuller enquiry is illegal. Notwithtanding the explanation of the committee and the note of dissent of the Vellore Co-operative Central Bank Limited, which was the financing bank of the Society, the joint Registrar, with a view to set right the affairs of the society and to safeguard the interests of the shareholders and the creditors of the Society and to place the Society on satisfactory basis, dissolved the committee. Appeals by the president and the members of the committee to the Registrar of Co-operative Societies under section 96 (2) of the Act were unsuccessful. Two writ petitions were filed, one by the President and the other by a Director of the Society, to quash the impugned order of the Joint Registrar which ultimately found favour with the Appellate Authority as well. When the Registrar of Co-operative Societies considered and heard the appeals, the ratio in W. A. No. 113 of 1969 was ruling. In applying the principle therein however, he, according to Alagiriswami, J., misapplied the same. The learned Judge gave certain findings which we reproduce more for completion of the relevant facts attendant upon these appeals :

"Even so, it appears to me, that in the case of this committee whateverelse might have been said, the charge, if analysed from the point of view set forth by the Bench, would show that at worst the committee has not been as active as it might have been. But after all the committee consists of non-official members; they are not whole time servants of the society ; they have their own private affairs to attend to; they have necessarily to depend upon a paid wholetime secretary and other members of the staff. The paid secretary during most of the times seems to have been a Deputy Registrar. It was their duty to have kept the regisgisters in proper order. It was their duty to have inspected and found deficiency in stock and brought it to be the notice of the committee. With regard to a number of matters with which the committee is charged, it could be seen that all of them relate to matters for which the paid permanent staff are primarily responsible. The committee can only supervise and cannot be engaged in day-to-day manage-

ment of the affairs of the society or even in matters like maintenance of registers or maintenance of accounts. It was the duty of the paid staff to have brought them to the notice of the committee. The Joint Registrar as well as the Registrar have failed to appreciate the scope of the duties of the Board of Directors and the permanent staff. There is no allegation or proof that the Board of Directors have either acted *mala fide* or have benefited themselves.............

Considering all the charges and the explanations, it appears to me that both the Registrar and the Joint Registrar have failed to keep clear in their minds the distinction between the duties and responsibilities of the committee and the paid per-permanent staff...............Undoubtedly there is no material whatsoever to hold that the committee in this case has wilfully disobeyed or wilfully failed to comply with the lawful order or directions of the Registrar under the Act or the Rules. The committee cannot by any standard be said to have been recalcitrant or lethargic. So the only question that arises is whether the committee was not functioning properly. The committee pointed out that the defects pointed out related only to day-to-day working and business of the society and that was purely administrative in character, that the paid staffs are in charge of the day-to-day administration of the societies and that it is the secretary, who is the chief executive authority of the society............................I do not see that opportunity was given to the committee to set right the irregularities............I am not satisfied that even taking into account a few minor charges, which may be held to be proved, they are of such a character that they could justify the drastic penalty of supersession.... On the whole I am satisfied that there was no justification for the s action taken by the Joint Registrar in this case to supersede the committee........"

One thing however which is conspicuous is that Alagiriaswami, J., was, as he expressed himself, bound by the decision of the Division Bench of this Court in W. A. No. 113 of 1969, the scope of which we shall presently consider. Before we notice the ratio of the Bench, certain general observations regarding the essence of co-operation and its process, as also the scheme of the Act, are necessary.

In a socialistic pattern of society, democratic process is the vehicle of action and if such a means is to be outwitted by the individualistic opinion of the Registrar of Co-operative Societies on *a priori* considerations and insufficient material, then it would be the very negation of co-operation, which is the essence of organised liberty. The title of the Act, though not conclusive, is one of the numerous sources from which assistance may be obtained in the ascertainment of the legislative intent of an enactment. Even so is the " Co-operative Societies Act." If therefore, as we will presently point out, there is some ambiguity in the application of a particular section of the Act which is penal in character to a particular set of material and facts, the title provides ample and singular assistance to interpret the particular section in harmony with and in conformity, to the other allied provisions therein. It is in this light that the democratic process envisaged and adumbrated fully in the Act should not lightly be displaced by an arbitrary dispensation if the jurisdictional facts to placate the former are not made available to the hierarchy of tribunals constituted under the Act to act judicially.

At this stage it is convenient to notice the provisions of the statute, to appreciate the nature, colour and scope of the jurisdiction of such statutory tribunals like the Joint Registrar of Co-operative Societies and the Registrar of Co-operative Societies particularly while deciding to supersede an elected body like the committee of a co-operative society functioning under the Act.

Section 2 (2) defines a "committee" as to mean " the governing body of a registered society to whom the management of its affairs is entrusted." Section 2 (6) explains a 'member' as a person joining in the application for the registration of a society and a person admitted to membership after registration". By section 2 (8) an 'officer' includes a president, vice-president, chairman, vice-chairman, secretary, assistant secretary, treasurer, *member of committee*, and any other person empowered under the rules or the bye-laws to give directions in regard to the business of the society.

Section 2 (10) defines 'Registrar' as "a person appointed to perform the duties of a Registrar of Co-operative Societies under this Act, and includes a person on whom all or any of the powers of a Registrar under this Act have been conferred under section 3." Section 4 provides for registration of a society under the Act "which has as its object the promotion of the economic interests of its members in accordance with co-operative principles............" "A financing bank" means a registered so-society which has as its principal object the lending of money to other registered societies. Section 27 provides for the constitution of a committee. "The general body of a registered society shall constitute a committee in accordance with the bye-laws and entrust the management of the affairs of the registered society to such committee". The proviso thereto provides for the constitution of such committees in case the society is registered after the commencement of the Act. Section 27 (3) (*a*) says that "the term of office of an elected member of a committee constituted under the Act shall be three years" and it also provides for the retirement of one-third of the members elected to the committee at the end of each year. The committee may also consist of a non-official member nominated either by the Registrar or the financing bank. Any casual vacancy in the office of a member of the committee shall be filled in such manner as may be specified in the rules or the by-laws. Section 28 prescribes the disqualifications for membership of committee. *Inter alia* it provides that any member who has been removed from the office of the member of the committee of the registered society is not eligible for being elected or appointed as a member of a committee. Section 28 (4) prescribes another kind of disqualification for being elected or appointed as a member of the committee. It is :

> "No member of a committee against whom an order under sub-section (1) of section 71 has been passed...............shall be eligible for election or appointment as a member of the committee for a period of three years from the date of such order."

Section 28 (5) (*a*) reads :

> "No member of a committee which has been superseded shall be eligible for election or appointment to the committee for a period of three years from the date of expiry of the period of supersession."

Even so section 28 (5) (*b*) provides :

> "No member of a committee in respect of which proceedings for supersession under section 72 are pending shall be eligible for election or appointment to the committee till the termination of those proceedings."

Section 28-A which has been inserted by the Madras Amending Act (VIII of 1966) is an important provision and has to be re-produced. It reads as under :—

> "(1) Where in the course of an audit under section 64 or an inquiry under section 65 or an inspection under section 66 or section 67, it appears that a person who is, or was, a member of a committee has misapropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or of gross or persistent negligence in connection with the conduct and management of, or of gross mismanagement of, the affairs of the society, or of misfeasance or default in carrying out his obligations and functions under the law, the Registrar may, without prejudice to any other action that may be taken against such member, by order in writing, remove such person from the office of member of committee, if he holds such office, or disqualify him from holding in future the office of a member of the committee, if he has ceased to hold such office.
>
> (2) No person shall be removed or disqualified under sub-section (1) without being given an opportunity of making his representations. A copy of the order removing or disqualifying him shall be communicated to him."

Section 31 provides a mandate and reads that the registration of a society shall render it a body corporate by the name under which it is registered, with perpetual succession and a common seal with various powers enumerated therein, attached to it. Chapter VIII of the Act deals with audit, inquiry, inspection, surcharge and

supersession. The accounts of a society shall be audited once at least in every year at the instance of the Registrar (section 64 (1). Section 64 (2) indicates the nature of the audit to be done under section 64 (1) and such audit shall include an examination of overdue debts, if any, the verification of the cash balance and securities and a valuation of the assets and liabilities of the society. For the successful examination of the accounts and for a proper audit as above, the Registrar may, under section 64 (5) by order in writing, direct any officer of the society to take such action as may be specified in the order to remedy within such time as may be specified therein the defects, if any, disclosed as a result of the audit. The procedure for conducting the audit is prescribed in rule 54 and it provides for the submission of an audit memorandum by the person examining the accounts. The audit memorandum, according to the above rule, is self-instructive and shall contain full particulars of all transactions which appear to be contrary to the provisions of the Act, all sums which ought to have been but have not been brought into the accounts by the society, any material impropriety or irregularity in the expenditure or in the realisation of moneys due to the society, and other instructive particulars mentioned therein. Section 65 gives the discretion to the Registrar to hold an inquiry into the constitution, working and financial condition of a registered society. Such an inquiry can be undertaken under the said section, on an application for the purpose by a majority of the committee or of not less than one-third of the members or on the request of the Collector. The person authorised by the Registrar to so inquire has several powers set out in section 65 (2). Such powers include the seizure of books, summoning of persons to give evidence, call for a general meeting or a meeting of the committee at such places to be decided by him either by himself or through any of the officers of the society and in the end, the inquiry officer is obliged to communicate the result of the inquiry in certain cases to the Government and in all cases to the financing bank to which the society is affiliated and lastly to the society concerned. Section 65 (4) is yet another power of the Registrar who may, by order in writing direct any officer of the society or its financing bank to take such action as may be specified in the order to remedy, within such time as may be specified therein, the defects, if any, disclosed as a result of the inquiry. One other special power vested in the Registrar under section 66 is that the Registrar may, of his own motion, or on the application of a creditor of a registered society, inspect or cause the inspection of the books of the society under certain circumstances. The financing bank also has the right to inspect the books of any registered society which is indebted to it. Section 66 (3) provides that the Registrar after such an inspection, may, by order in writing, direct any officer of the society to take such action as may be specified in the order to remedy within such time as may be specified therein the defects, if any, disclosed as a result of the inspection. Section 70 provides for suspension of a paid officer or servant of a registered society who in the course of an audit under section 64 or an inquiry under section 65 or an inspection under section 66 or section 67, has been found to have committed or has been otherwise responsible for misappropriation, breach of trust or other offence in relation to the society. Such an order of suspension shall be obeyd by the committee of the society. Section 71 provides for the surcharging of any person who is or was entrusted with the organisation or management of the society or any past or present officer or servant of the society who has misappropriated or fraudulently retained any money or any other property or been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made unauthorised payments contrary to the Act, by-laws and directions. The Registrar can act under this section on his own motion or on the application of the committee, liquidator or any creditor or contributory and inquire into the conduct of the person concerned and direct him to restitute the moneys or properties found to have been misappropriated by him. Any such inquiry shall not be held after the expiry of six years from the date of any act or omission referred to in this sub-section. An opportunity to the alleged delinquent officer should be given to enable him to make his representations. Lastly comes section 72 which provides for the supersession of committee. Section 72 (1) (*a*) reads as follows :

"If, in the opinion of the Registrar, the committee of any registered society is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the rules, he may, after giving the committee an opportunity of making its representations, by order in writing, dissolve the committee and appoint either a person (hereinafter referred to as the special officer) or a committee of two or more persons (hereinafter referred to as the managing committee) to manage the affairs of the society for a specified period not exceeding two year."

The Registrar on appointing a Special Officer may also appoint an advisory board to assist him. The remuneration of the special Officer shall also be fixed by him. Before taking any action under sub-section (1) of section 72 in respect of any registered society, the Registrar shall consult the financing bank to which the society is indebted. It is thus seen that a committee can be superseded in case it is not functioning properly or wilfully disobeys or wilfully fails to comply with any lawful order or direction issued by the Registrar under this Act or the Rules. One other section can also be usefully referred to. Section 85 appearing in Chapter XI dealing with winding up and cancellation of registration of registered societies, provides for the winding up of registered societies as under :—

"(1) If the Registrar, after an inquiry has been held under section 65 or an inspection has been made under section 66 or section 67, or on receipt of an application made by not less than three fourths of the members of a registered society, is of opinion that the society ought to be wound up, he may, after giving the society an opportunity of making its representations, by order in writing direct it to be wound up. A copy of the order shall forthwith be communicated to the society by registered posts."

Thus, even the winding up of a registered society by the Registrar could be undertaken only after an inquiry has been held under section 65 or an inspection has been made under section 66 or section 67 or at the request of not less than three-fourth of the members of the registered society. Here also, the society has to be given an opportunity to make its representations to the contrary. Section 85 (2) provides for the other circumstances in which a society could be wound up. Section 101 is a penal section which provides for punishment of the committee of a society, an officer of a society, an officer employed, paid servant or any member of a society who furnishes false information or disobeys summons or other lawful order, requisition or direction issued under the provisions of the Act.

From the scheme of the Act and the primordial purpose and intendment of the Act it appears that the Registrar of Co-operative Societies is constituted as a vigilant sentinel to look to the proper working and functioning of Co-operative Societies created and registered under the Act, and though certain powers are vested in him in relation to such supervisory jurisdiction vested in him, yet such powers though *prima facie* exercisable on his subjective satisfaction, they have to pass muster objectively as well and should conform reasonably with the reality of the situation. A Committee of management, in so far as a co-operative society is concerned, is the sole body to which is entrusted the affairs of the said society. A "member of the committee" is deemed to be an officer of the society the primary object of which is to advance the economic interests on co-operative principles. A 'committee' is an elected body of which one-third of the members constituting the said committee shall retire once in three years. In fact, there is an interdict on persons against whom action is taken under section 71 or 72 from being and continuing to be a member of the committee. It is however, important to note that when the Registrar of Co-operative Societies or any officer authorised in that behalf by the statute intends taking any action against a member of the society or a member of the committee or against the society as a whole, it appears from the scheme of the statutory provisions that an audit under section 64 or an inquiry under section 65 or an inspection under section 66 is a necessary concomitance and the report or material obtained on such audit, inquiry or inspection form as it were the foundation or bedrock for the supervening action, whatever the nature of such action may be, which is to be undertaken

by the Registrar of Co-operative Societies. It is unlikely that the Registrar could be said to be armed with the necessary material, hypothesis and equipment to penalise a member, a member of the committee or the society, on inchoate information obtained by him from some source other than the statutory prescribed channels such as audit, inquiry or inspection. In fact, a registered society is a body corporate with perpetual succession and a common seal. Analogically therefore, it follows that body constituted for the purpose of administering such a society should also be deemed and held to be a continuous body though by various events specified in the statute there may be a change in the personnel of such management. Sections 64, 65 and 66, which are the statutory procedural stems which interdict the apparently arbitrary course of action which a Registrar could undertake to interfere with the affairs of a society, its members or officers, provide a sufficient halo to tighten up such indiscriminate and unguided exercise of the powers by the Registrar, when it becomes necessary. In each of those sections it is incumbent on the Registrar to give an opportunity to the member concerned, officer concerned or the society concerned to rectify the defects. If this much is clear and unambiguous, the intention of the Legislature whose purpose is to advance co-operation and suppress bureaucracy, then it cannot be lightly predicated that if the Registrar forms an opinion *aliunde* and otherwise than on an audit report, inquiry report or inspection report, the jurisdictional fact which has to be found by the Registrar before he attempts to exercise his statutory powers under the Act is available to him. In our view, and under the scheme of the Act, the condition precedent to the exercise of jurisdiction by the Registrar under one or the other of the sections considered above and in particular section 72 is to secure an audit memorandum or a report of inspection or inquiry, so that he may be provided with the necessary material to act thereon. Unless such a fact finding authority has provided the Registrar with the hypothesis to act and ultimately supersede an elected body, the impugned order of supersession will undoubtedly be tainted with the absence of a jurisdictional basis. Whether such a basis exists, is subject to review by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India.

No tribunal subject to the jurisdiction of the High Court can on its own volition finally decide on the question of the existence or extent of its jurisdiction to pass orders which are punitive in nature and above all to set at naught a committee of management of a co-operative society elected by its general body or members. If, therefore, the purport of sections 64, 65, 66 and 67 is fully appreciated and correctly understood, it appears to us that before the Registrar can take action which would result in the imposition of a penalty, he should not only give an opportunity to the delinquent member, officer, committee or society, but he should also be armed with the related reports under sections 64, 65 or 66. This appears to be a mandatory provision from which there is no escape.

From the nature of the charges framed in these proceedings before us it appears to us that the Registrar has avoided the prescribed legislative channel of procedure which he is obliged to adopt before he takes action under section 72 of the Act. By way of illustration we could consider some of the charges mentioned and dealt with by the Registrar. The Registrar is of the view that several deficits were noticed in the stocks of the society or its associates as pointed out in the audit report. But it is not clear whether any action was taken under section 64 (5) to remedy that defect. Even as surmised by the Registrar, if the working of the society was irregular it is not understandable as to why an inquiry was not held under section 65. Section 65 provides ample plenary authority to the Registrar to set right matters and indeed under section 65 (4) an opportunity has to be given to the society as a whole or its financing bank to remedy such defects, if any, disclosed as a result of the inquiry. It does not appear that any such inquiry as contemplated under section 65 was undertaken. The right of inspection contemplated in section 66 is yet again a prerequisite before the Registrar could finally supersede a committee. No such statutory inspection has been done, nor was it stated before us that any such inspection was undertaken. The charges, no doubt, relate to certain discrepancies during the years 1964 and 1965. It is not disputed that there has been a change in the personnel of the com-

mittee year after year due to the operation of section 27 (3) of the Act. Though this reconstitution of the committee may not by itself matter as would be indicated by us later, yet in such circumstances where there is an annual change by necessity, in the body constituting the committee, it becomes all the more necessary for the Registrar to equip himself with the audit. inquiry, or inspection report before a final decision can be arrived at under section 72 of the Act. As already stated, even in the case wherein the Registrar is of the opinion that the society ought to be wound up, an inquiry under section 65 and an inspection under section 66 or 67 are pre-eminently needed. Thus, if the Registrar cannot take action against a member for unsatisfactory working and the financial condition of a registered society without an inquiry under section 65 and if the Registrar cannot take *suo motu* action without giving an opportunity to the erring member, officer or society to remedy the defects found and noticed in the course of the audit, inquiry and inspection and when a member or officer cannot even be surcharged on the ground of misappropriation or fraudulent retention of moneys or deliberate causance of any deficiency in the assets of the society without such action being preceded by the procedure contemplated in sections 64, 65, 66 or 67, then it appears to us that even under section 72 of the Act which enables the Registrar to supersede a committee in management of the affairs of the society he cannot unilaterally act and base his penal action solely on his subjective satisfaction.

This leads on to the question as to what is opinion or subjective satisfaction and its relative impact on supersession of a committee of management of a co-operative society. 'Supersession' means to make the existing things inefficacious by exercise of superior power. Such a power if vested in a statutory tribunal, it should exercise it in a judicious spirit and primarily to render substantial justice. The decision should be arrived at by such a tribunal which is ordinarily characterised as one vested with quasi-judicial functions in a spirit and with a high sense of responsibility in order to mete out justice ultimately. We have in the analysis undertaken by us as above, sought to explain the fascicule of the sections which lend support to the irresistable conclusion that section 72 ought not to be read and interpreted in the abstract *de hors* the intent and purport envisaged in the prior sections, which form part and parcel of the same chapter. When two or more sections appearing together and in the same context are susceptible of analogous meaning, they are to be understood in their cognate sense. Each section and the action contemplated therein lend colour to the other section and it is on such cumulative understanding of the sections and their application, that the tribunal empowered to brand a committee as inefficacious, should act and act judiciously as well after giving an effective opportunity to the committee to rectify the defects. Alagiriswami, J., rightly found that no such opportunity was given to the committee to set right the irregularities and that there was no justification for the action taken by the Joint Registrar to supersede the committee. Apart from the view of the learned Judge that the defects in the main are attributeable to the executive staff of the society which includes a Government official of the rank of a Deputy Registrar of Co-operative Societies, we are unable to uphold the impugned order on the ground that the Registrar failed to secure the necessary facts and material which could vest him with the necessary jurisdiction to act under section 72 of the Act.

The section, however, speaks of the opinion of the Registrar which is essentially subjective in nature. It is to be remembered, however that the result of the action taken under section 72 would make a statutory functionary dormant. In such circumstances it is to be considered whether mere and bare subjective information of the Registrar can prevail and no standard of objectivity is any more required for the exercise of such power. Section 72 contemplates that the initial hypothesis necessary to enable the Registrar to act under it is that the society is not functioning properly. We agree with Alagiriswami, J., that there is absolutely no material whatsoever to hold that the committee in this case has wilfully disobeyed or wilfully failed to comply with the lawful order or directions of the Registrar under the Act or the Rules. This is yet another limb of section 72 which vests in the Registrar the jurisdiction to act and supersede. Under section 65, an inquiry can be directed by the

Registrar into the working and financial condition of a registered society. Ordinarily it could be expected that if the working or the functioning of the society is not proper, then only an inquiry would be directed. If, therefore, the language in section 65 (1) and section 72 (1) (*a*) have to be reconciled and harmoniously interpreted, it apppears to us that no order as to supersession can be made without an inquiry or inspection as contemplated earlier. It is in this respect that the subjective opinion which is the guideline provided in section 72 is intermixed with certain objective standards as well which have to be placed in the forefront before a decision is arrived at. It can only be then said that the superior power vested in the Registrar under section 72 to render dormant an elected body has been rightly exercised by him without violating the principles of natural justice and having foremost in his mind his duty to render substantial justice. No doubt, it is an accepted principle of law that where a statute provides a particular course of action and makes it dependent upon the subjective satisfaction of a tribunal created by the Act, then the decision arrived at by the said tribunal, if it does not violate the principles of natural justice and is *bona fide prima facie*, then the Court cannot substitute its judgment as if it were a Court of appeal over the said tribunal. In the instant case, however, not only the principles of natural justice have been violated, but the Registrar assumed jurisdiction without the hypothesis essential for him to deal with the circumstances of this case and such exercise of power by a quasi-judicial tribunal has to be set at naught as its acceptance would be to encourage arbitrariness and throw overboard principles of natural justice. Under these circumstances we agree, though for a different reason, with Alagiriswami, J.

Now it has to be considered whether the acceptance of the ratio in W.A. No. 113 of 1969 by Alagiriswami, J., which also formed another course of his reasoning for allowing of the Writ Petitions is correct. In fact, the reference to this Full Bench has been occasioned because the learned Judges who constituted the Division Bench in the first instance took *prima facie* a view contrary to that expressed in W.A. No. 113 of 1969, which will hereafter be referred to as Writ Appeal.

In the Writ Appeal, Anantanarayanan, C.J., and Natesan J., who constituted the Bench, agreed with the contention of the Registrar of Co-operative Societies that the committee under the Act being the governing body of the Society statutorily formed, is a permanent body, a legal entity with continuous existence notwithstanding the charges in personnel. Speaking for the Bench, Natesan, J., in the Writ Appeal, observed :—

> "True the Committee as such is not made under the Act a body corporate with perpetual succession and a common seal. But that does not affect the determination of the question we are now called upon to decide...............But the crux of the matter is that no period is fixed for the life of the Committee, and its continued existence is secured in the provisions as to its constitution. We are clearly of the view that for initiation of proceedings under section 72, there can be no question of previous committee and present committee. Action can be taken under the section against the governing body of the Bank as a legal entity having continuous existence, notwithstanding the annual retirement of one-third of the members of the Committee and re-election in their place."

To the above dicta, there can be no exception. As a matter of fact, we have noticed in this judgment the various provisions of the Act and the cause which might affect a change in the personnel of the committee ; but nevertheless it is seen that the continuity of the committee is maintained for all purposes and it is not possible to uphold the view that the committee has to be truncated according to the physical personnel constituing it from time to time, and thus truncated, there is a snap in the chain of continuity of such a committee and, therefore, it should be deemed to be non-permanent.

In the Writ Appeal, however, an opinion has been expressed that as the committee acts only through its members who enter into and exit therefrom from time to time, any act of omission or commission on which the charges of supersession are to be

based must be related to the committee as constituted when supersession is proposed. According to the learned Judges, there must be some nexus between the act complained of and the personnel constituting the committee and finally the learned Judges observed that the virus infecting the society should be found in the committee when it is proposed to dissolve it. They were also of the view that the section in reality provides for action against the committee composed of recalcitrant members and lethargic committees that could not be activated. Said the Division Bench :—

> "Before any opportunity is given to the members of the governing body so constituted to set right matters, and before they have had time to take steps in that regard, is this body to be superseded under section 72 of the Act solely for the acts of their predecessors ? It may be that the Registrar will not do so. In our view, section 72 does not contemplate action in such a case, to supersede the committee in the circumstances would be abuse of powers....Equally, though the committee is an entity by itself, the Registrar can look to the realities behind the legal facade to ascertain the causes for the deterioration in the affairs of the society."

It would thus appear from the latter portion of the ratio in the Writ Appeal that unless there is a link between the act and the person or persons constituting the committee then only the necessary hypothesis is available to the Registrar to act under section 72 and ultimately supersede the committee. With respect to the learned Judges who decided the Writ Appeal, we are unable to agree that such is the foundation for the exercise of jurisdiction by the Registrar under section 72 of the Act. Once it is not disputed, as it is indisputable, that the committee as a staturoty body is a permanent and a continuous one, then it cannot be said that any change in the personnel of the committee would effect, a consequential change, in any manner whatsoever, in the statutory body as such. If such a limited scope and interpretation is to be given to such a statutory functionary, then it would cease to be a permanent body. Once it is conceded that the body is a legal entity with continuous existence, to say that the acts of commission and omission of the previous committee cannot be mechanically attributed to the succeeding committee unless there is a link between the act and the person or persons constituting the committee would be to whittle down the pronouncement made that the body is a permanent and a continuous one. Indeed such a wedging into its legal character for any purpose is irreconcilable, "Once permanent, always permanent," can have no exception. We are unable with respect, to accept the reasoning that as the committee acts through human beings, it is essential that the impugned acts or the substance of the charges must be brought home to one or the other of the members of the committee physically constituting it. Subject to the other limitations provided for in the Act itself, it is open to the Registrar to take such action as indicated in the first part of our judgment to call upon the committee functioning for the time being and on behalf of the society to explain and show cause why it should not be superseded. The latter portion of the decision in the Writ Appeal creates, in our opinion, a limitation which cannot be supported by the very language and intendment of the various provisions of the Co-operative Societies Act. We are, therefore, unable, with respect, to agree with the observations made by the learned Judges in the Writ Appeal and excepted above. We hold that all other circumstances, data and material being available or made available to the Registrar of Co-operative Societies in the manner indicated by us, he would be within his jurisdiction to take action under section 72 against the committee which at or about the time of action was functioning as committee of management of the socitey notwithstanding the fact that the charges imputed or defects noticed or irregularities complained of were those attributable to or referrable to the administration, management and conduct of an earlier committee and notwithstanding also the fact that the committee against whom the show cause notice is issued consists of persons wholly or partially different from those constituted the earlier committee or committees.

In the result, however, the Writ Appeals are dismissed, but in the circumstances there will be no order as to costs.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE P. S. KAILASAM.

S. Janakiraman .. *Petitioner**

v.

The State of Madras represented by the Accommodation Controller, Madras and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 3 (3), 21 *and* 30—*Scope—Residential building (with a monthly rent over Rs.* 250)—*Conversion into non-residential building—Allotment under section* 3 (3) *if outside the jurisdiction of the Accommodation Controller.*

A residential building can be converted into a non-residential building only with the permission in writing of the Controller. Controller is defined in the Act (XVIII of 1960) as the person appointed to perform the functions of a Controller under the Act and that term refers to the Rent Controller, whereas the officer who functions under section 3 (3) in allotting the building for Governmental purposes is the authorised officer and not the Controller. The Accommodation Controller has no power to convert a residential building into a non-residential building. When the Accommodation Controller passed the impugned order, he was allotting a residential building to the 2nd respondent fixing the rent at Rs. 450. A residential building with a monthly rent over Rs. 250 being exempted from the operation of the Act, the building was outside the jurisdiction of the Accommodation Controller. The order of the Accommodation Controller has, therefore to be quashed.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in the proceedings in No. A. 10-24060/65 relating to premises No. 92, Rayapettah, High Road, Mylapore, Madras on the file of the first respondent, and quash the order of allotment No. A, 10.24060/65 dated 13th October, 1965 and made therein.

R. Mathrubutham and *T. S. Sundaresa Aiyar*, for Petitioner.

S. T. Ramalingam, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—This petition is filed by the landlord of premises No. 92, Royapettah High Road. The building was let out to a tutorial College from 1960 to 1964. The tenant vacated the premises on 1st April, 1964 and the petitioner occupied the building for his residence. On 21st September, 1965 the petitioner informed the Accommodation Controller that he had vacated his premises 92, Royapettah High Road on 15th September, 1965. He also stated that he desired to let out the building for non-residential purposes to the Director, Coaxial Cable project, Ordinance Lines, 2nd respondent in this petition, on a monthly rental of Rs. 950. The Accommodation Controller was asked to accord his permission. On 27th September, 1965 the Accommodation Controller issued an order under section 3 (3) of the Madras Buildings (Lease and Rent Control) Act, 1960, informing the the petitioner that the premises was required for Governmental purposes and the premises should not be occupied by the landlord, but should be handed over to the person authorised by the Accommodation Controller. On 13th October, 1965 the Accommodation Controller allotted the premises to the Director, Madras Ernakulam Coaxial Cable Project for locating his office from 21st September, 1965 and fixed the rent of the premises at Rs. 450 subject to the fixation of fair rent The validity of this order is questioned by the Petitioner.

*W.P. No. 509 of 1966. 1st November, 1968.

By his letter dated 21st September, 1965 the petitioner had intimated vacancy of premises 92, Royapettah High Road, Madras, by his vacating it. The subject of this letter is noted as 'notice of vacancy and permission to let out.' The petitioner cannot be heard to contend that this is not a notice intimating vacancy. It is no doubt true that the petitioner has prayed for permission to let out the building for non-residential purposes to the 2nd respondent. But that will not help the petitioner as the letter is clearly one of notice of vacancy. The Accommodation Controller will be within his rights in taking over the premises and allotting it for Governmental purposes under Section 3 (3) within seven days from the receipt of the notice But section 30 of the Act exempts from the operation of the Act residential building occupied by one tenant if the monthly rent paid by him in respect of that building exceeds Rs. 250. If the rent of the building in question is less than Rs. 250 the Accommodation Controller would be within his powers. But it is seen from the impugned order that the rent was fixed at Rs. 450. It is stated that at the request of the petitioner the Accommodation Controller treated the building as a non residential building for which exemption under section 30 is not applicable and therefore he was within his rights to allot the building for Governmental purposes. The question whether the building was used for residential or non-residential purpose from 1960 to 1964 when it was in the occupation of the tutorial college need not be decided. Even if it is taken that it was used for non-residential purpose the building was vacated on 1st April, 1964 and subsequently it was in the occupation of the petitioner. Section 21 of the Act prohibits the conversion of a residential building into a non-residential building except with the permission in writing of the Controller. There is no such bar regarding the conversion of non-residential building into a residential building. There can be no dispute as to the nature of the user of the building when the petitioner was in occupation when he was residing in it between April, 1964 and 21st September, 1965. The building was undoubtedly a residential one. No doubt the petitioner had applied to the Accommodation Controller for permission to convert it into a non-residential building and to let it to the 2nd respondent. A residential building can be converted into a non-residential building only with the permission in writing of the Controller. Controller is defined in the Act as the person appointed to perform the functions of a Controller under the Act and that term refers to the Rent Controller, whereas the Officer who functions under section 3 (3) in allotting the building for Governmental purposes is the authorised officer and not the Controller. The Accommodation Controller has no power to convert a residential building into a non-residential building. When the Accommodation Controller passed the impugned order, he was allotting a residential building to the 2nd respondent fixing the rent at Rs. 450. A residential building with a monthly rent over Rs. 250 being exempted from the operation of the Act, the building was outside the jurisdiction of the Accommodation Controller. The order of the Accommodation Controller has to be quashed on this ground.

The petition is allowed and the allotment of the building by the Accommodation Controller to the 2nd respondent is quashed. The premises will be released for the occupation of the petitioner. Time for giving vacant possession three months from this date. No order as to costs.

V.M.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. M. ISMAIL.

B. Susila and another .. *Appellant**

v.

Saraswathi Ammal and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 66 *and* 90 (*Mad.*)—*Application by decree-holder for reducing the upset price—Judgment-debtor if entitled to notice—Failure to give notice if constitutes material irregularity or illegality within rule* 90.

Under Order 21, rule 66 as amended by Madras High Court, there is absolutely no provision for the Court to fix any upset price. It is open to the Court, if the circumstances of the case justify, to arrive at its own valuation and fix the upset price; but the Court is under no obligation to fix it. Thus when the Court fixes the upset price or modifies either by way of enhancement or reduction of the upset price orginally fixed, it cannot be said that the Court is acting pursuant to the obligation imposed upon it under Order 21, rule 66. Therefore, from the point of view of the provision contained in Order 21, rule 66, it cannot be said that, whenever the Court fixes the upset price or alters the upset price, it is under an obligation to give notice to the judgment-debtor. Consequently, the failure to give notices to the judgment-debtor of an application for reducing the upset price will not constitute material irregularity or illegality so as to come within the scope of Order 21, rule 90.

Nor can it be contended that independent of Order 21, rule 66, the judgment debtor is entitled to notice whenever the Court alters the upset price as required by the decree-holder. The reason is this. When the Court fixes the upset price in a sale proclamation, the Court is not determining the rights of any of the parties before it and the fixation of upset price may be an indication of the probable price which the property may fetch from the point of view of the intending bidders, but it is not binding either on the decree-holder or the judgment-debtor or even on the Court.

Appeal against the order of the Sub-Court, Tiruchirapalli in E.A. No. 297 of 1964 in O.S. No. 107 of 1953.

P. Balasubramaniam, for Appellant.

C. S. Swaminathan, for Respondent.

The Court made the following

ORDER.—This is an appeal against an order of the learned Second Additional Subordinate Judge, Tiruchirapalli, dated 21st April, 1965, dismissing E.A. No. 297 of 1964 in O.S. No. 107 of 1953. The said E.A. itself was filed by supplemental defendants 3 and 4 in O.S. No. 107 of 1953, under Order 21, rule 90, Civil Procedure Code, for setting aside a sale of the house property sold in execution of the decree passed against them in O.S. 107 of 1953 on 19th June, 1963. The sale was knocked down in favour of the first respondent for a sum of Rs. 2,05,000, on 19th June, 1963 and the application was filed on 17th July, 1963. In the said application, the appellants herein had taken the following three grounds for the purpose of setting aside the sale; (1) due notice of the execution or of the application to reduce the upset price has not been served on the petitioners; (2) the property has been sold for a grossly inadequate price inasmuch as the decree-holder has been able to knock off the property for a price which will be a third of its real value; and (3) that by reason of the fraud committed by the decree-holders in getting the upset price reduced *i.e.*, without notice to the petitioners, the property did not fetch a proper price at the sale ,with the result that the sale held on 19th June, 1963 resulted in substantial prejudice to the appellants.

* A. A. O. No. 174 of 1965. 6th November, 1968.

The learned Second Additional Subordinate Judge came to the conclusion that, with regard to the application filed by the decree-holder for reduction of the upset price previously fixed, the appellants herein were not entitled to any notice, and therefore there was no irregularity or illegality of the conduct of the sale. With regard to the second point, the learned Judge came to the conclusion that the property was not sold for an inadequate price and consequently the appellants herein had not suffered substantial injury on account of any irregularity in the matter of the publication of sale as contended for on their behalf.

Before I deal with the point urged before me, it is better to refer to the facts that had taken place anterior to the sale of the property, as stated by the learned Subordinate Judge himself, in the judgment, the correctness of which was not disputed before me:

"The execution application for attachment and sale of the property of the judgment-debtor, the late Thiagaraja Bhagavathar was filed as early as 5th December, 1959 against the heirs of the late M.K. Thiagaraja Bhagavathar of whom the petitioners are the daughters. Notice was ordered under Order 21, rule 66, Civil Procedure Code, in the said application on 17th March, 1960. As the petitioners herein were not served, fresh notice was ordered on 22nd April, 1960 for 29th June, 1960. The said notices were returned with endorsement absent affixed and hence on 29th June, 1960, the Court was pleased to order fresh notice by substituted service for 22nd July, 1960. The substituted service ordered was effected on the petitioners and since they were absent they were declared *ex parte* on 1st August, 1960 after accepting the service as sufficient. In those circumstances it will be idle now to contend that no notice was issued to them under Order 21, rule 66, Civil Procedure Code. As regards the other complaint that they were not served with notices for the subsequent applications for the reduction of upset prices it is found that originally upset price was fixed at 5 lakhs. As the property was not sold the decree-holders filed an application under E.A. No. 807 of 1960 for the reduction of upset price from five lakhs to two lakhs. In that petition also notice was ordered on 14th December, 1960 for 9th January, 1961. As the petitioners were not served for that hearing date a fresh notice was also ordered and since these petitioners were absent on the date of hearing they were set *ex parte*. Then the upset price was reduced to Rs. 4,05,000. There were no bidders for that sale. The decree-holders filed E.A. No. 810 of 1962 to reduce the upset price from Rs. 4,05,000 to Rs. 1,50,000. Again notice was ordered in this application to the petitioners for 18th December, 1962. Fresh notice was also ordered on 18th December, 1962, for the hearing dated 19th January, 1963. As the petitioner's brother Ravindran alone appeared in that application and the petitioners were absent they were set *ex parte* and after hearing the arguments advanced on behalf of the brother of the petitioners upset price was reduced to Rs. 3,50,000 even though the decree-holder wanted the upset price to be reduced to Rs. 1,50,000. No doubt at this stage the decree-holders filed an application in E.A. No 156 of 1963 for permitting the first respondent herein to bid and set off in the sale to be held on 3rd April, 1963. Since that sale also could not take place for want of bidders the decree-holders respondents filed E.A. No 222 of 1963 on 8th April, 1963 to reduce the upset price from Rs. 3,50,000 to Rs. 1,50,000 and notice was ordered for 11th April, 1963. As the decree-holders' pleader wanted to have the sale proclamation issued during the summer recess and was anxious to bring the property to sale at least after the reopening of the Court the petition was heard without notice being taken to the petitioners herein and was ordered. Under that application the upset price was reduced to Rs. 2,00,000, after hearing the Counsel for the petitioner's brother Ravindran."

Thus it will be seen that the original sale proclamation was settled after notice to the appellants herein as required under Order 21, rule 66, Civil Procedure Code, and after setting them *ex parte*. Three attempts were made to sell the property and since no bidders came forward, applications were filed to reduce the upset price originally fixed by Court and except with regard to the last application, E.A. No. 222

of 1963, in all other applications notices were taken to the appellants but they remained, *ex parte*. Consequently, the question that arises for consideration is whether the failure to give notice to the appellants in E.A. No 222 of 1963 which was an application for reducing the upset price constitutes material irregularity or illegality, so as to come within the scope of Order 21, rule 90, Civil Procedure Code, entitling the appellant to have the sale set aside.

Learned Counsel for the appellants contended that, since the upset price was fixed as part of the sale proclamation settled under Order 21, rule 66, Civil Procedure Code, the appellants are entitled to notice, whenever any change or alteration or modification is contemplated in anything that is contained in the said sale proclamation. I may straight away point out that, under Order 21, rule 66, Civil Procedure Code, as amended by this Court, there is absolutely no provision for the Court to fix any upset price and all that the rule requires the Court to do is to mention the valuations of the property as given by the decree holder as well as by the judgment debtor. It is open to the Court, if the circumstances of the case justify, to arrive at its own valuation and fix the upset price ; but the Court is under no obligation under the statute to fix the upset price. Therefore, when the Court fixes the upset price or modifies either by way of enhancement or reduction of the upset price originally fixed, it cannot be said that the Court is acting pursuant to the obligation imposed upon it under Order 21, rule 66, Civil Procedure Code. Therefore, from the point of view of the provision contained in Order 21, rule 66, Civil Procedure Code, it cannot be said that, whenever the Court fixes the upset price or alters the upset price, it is under an obligation to give notice to the judgment-debtors.

Then the question arises whether, independent of Order 21, rule 66, Civil Procedure Code, the judgment-debtor is entitled to notice, whenever the Court, as required by the decree-holder, alters the upset price. In my opinion, a judgment-debtor is not entitled to any such notice. The reason is this. When the Court fixes the upset price in a sale proclamation, the Court is not determining the rights of any of the parties before it and the fixation of upset price may be an indication of the probable price which the property may fetch from the point of view of the intending bidders ; but it is not binding either on the decree-holder or the judgment-debtor or even on the Court. Notwithstanding the fixation of the upset price and notwithstanding the fact that a bidder has offered an amount higher than the upset price, it is still open to the judgment-debtor to go before the Court and allege that the property has not fetched the proper price; and, he can have the sale set aside, if he can establish that the inadequacy of the price is the result of material irregularity or fraud in the publication or the conduct of the sale. Consequently, the fixation of the upset price by the Court, does not affect the rights of any of the parties, and it is not, therefore, open to the judgment-debtors to contend that independent of Order 21, rule 66, Civil Procedure Code, they are entitled to notice of an application filed by the decree-holder for reducing the upset price. As a matter of fact, there had been a view in this Court that fixation of upset price is not a judicial act but merely an administrative act, because of the reason that it does not affect the rights of any parties.

Mr. P. Balasubramaniam, learned Counsel for the appellants, drew my attention to the decision of this Court in *Yellappa Naidu* v. *Venugopal Naidu*[1], and *Kuppammal* v. *Devendra Iyer*[2]. In my opinion, none of these decisions supports the case of the appellants in this case. These decisions merely lay down under Order 21, rule 66, Civil Procedure Code, the Court has an obligation to mention the valuations given by the decree-holder as well as by the judgment-debtor, but it cannot designate both these valuations as upset price. On the other hand, Mr. Balasubramaniam was not able to bring to my notice any decision of this Court holding that failure to give notice of an application to reduce the upset price will constitute material irregularity

1. (1957) 70 L.W. 815.   2. (1957) 70 L.W. 493 : (1957) 2 M.L.J. 134.

or fraud either in the publication or conduct of the sale, so as to enable the judgment debtor to have the sale set aside under Order 21, rule 90, Civil Procedure Code. Under these circumstances, I am of opinion that the conclusion of the lower Court on this point is correct and does not call for any interference.

No other point was urged before me and hence the appeal is dismissed. But there will be no order as to costs.

V.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K.S. VENKATARAMAN.

Chinnaswami Mudaliar and another .. *Appellants**

v.

Rajalakshmi Ammal and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 3—Scope—Unregistered sale deed—Averment of possession (in the plaint)—Alleged possession, if amounts to notice of title to the defendants—Trusts Act (II of 1882), section 91.

Under section 3 of the Transfer of Property Act, the possession of the plaintiff, if true, would be notice to the defendants of the title under which the plaintiff was in possession from 1952. At the same time, it is clear that the plaintiff cannot seek to affect the defendants (purchaser of the property) with notice of Exhibit A-2 (unregistered sale deed in her favour) except by proving the alleged possession of the plaintiff from 1952, because that is the only averment in the plaint relevant on the question of notice to the defendants.

Appeal against the order of the Court of the Subordinate Judge, Cuddalore dated 23rd July, 1965 and made in A.S.No. 385 of 1964 (O.S.No. 92 of 1963, D.M.C. Kallakurichi).

T.V. Balakrishnan, for Appellant.

V. Krishnan, for Respondent.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of remand. Defendants 1 and 2 are the appellants. They are brothers. The second defendant purchased the property in question, a small house site of 2 cents, from the owner, the third defendant, under a registered sale deed, Exhibit B-1 dated 20th February, 1956, for a sum of Rs. 80. The Plaintiff brought the suit for a declaration of her title and possession, claiming under a sale deed from the same third defendant Exhibit A-1, dated 21st September, 1957, for Rs. 100. Though that sale deed is after Exhibit B-1, the case of the plaintiff is that as early as on 29th June, 1952, under Exhibit A-2, the third defendant sold the property to her for Rs. 100 and put her in possession, but did not get the sale deed registered. The plaintiff alleges that in 1961 the defendants trespassed into the property and hence the suit.

The learned District Munsif held that Exhibit A-2, was not genuine. One of the reasons given by him for his conclusion is that in Exhibit B-2, dated 9th July, 1953, a registered mortgage executed by the plaintiff in favour of one Kuppanna Goundar relating to a property adjoining the suit site, the suit site is described as a boundary and as belonging to the third defendant. The learned District Munsif points out that if the plaintiff had been put in possession of the suit site in 1952 itself, though only under an unregistered sale deed, the suit site would not have been described as still belonging to the third defendant. The learned District Munsif found that the plaintiff had not proved possession from 1952. In view of these findings that Exhibit A-2 was not genuine and on the question of possession of the plaintiff

*A.A.O. No. 248 of 1965. 5th November, 1968.

from 1952, the learned District Munsif had no difficulty in holding that the sale deed, Exhibit B-1, in favour of defendant 2, would have to prevail over that to the plaintiff.

In appeal, however, the learned Additional Subordinate Judge, without giving his findings on the genuineness of Exhibit A-2 and the case of the plaintiff having been in possession from 1952, has observed that it was necessary to frame an issue and record a finding thereon, whether defendants 1 and 2 had knowledge of the sale deed, Exhibit A-2, dated 29th June, 1952, and on this ground he has set aside the judgment and decree of the learned District Munsif and remanded the suit for fresh trial.

Sri V. Krishnan, learned Counsel foi the respondent-plaintiff, refers to section 91 of the Trusts Act. It is as follows :—

> " Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

Sri T.V. Balakrishnan, learned Counsel for the appellants, concedes that section 91 will govern the decision of this Case. But it is obvious that in order that section 91 can be invoked by the plaintiff, it is necessary to prove, first of all, that the unregistered sale deed, Exhibit A-2, is genuine. That question had got to be decided first by the learned Suboidinate Juge. If that question was decided against the plaintiff, no further question would arise and the suit would have to be dismissed. It was wrong on the part of the learned Judge to have remanded the suit without deciding the question of the genuineness of Exhibit A-2.

Assuming that Exhibit A-2 is found to be genuine, the further question would arise whethei the defendants had notice of Exhibit A-2 when they took the sale deed, Exhibit B-1. On this point, Sri T.V. Balakrishnan, learned Counsel for the appellants, contends that the plaintiff has not specifically pleaded in her plaint that the defendants had notice of Exhibit A-2 and that therefore it is not open to the plaintiff to raise that question at all. It is true that the plaint does not specifically say that the defendants had notice of Exhibit A-2. But the plaint states as a fact that the plaintiff had been in continuous possession and enjoyment of the property since June, 1952. Under section 3 of the Transfer of Property Act, the possession of the plaintiff, if true, would be notice to the defendants of the title under which the plaintiff, was in possession from 1952. At the same time, it is clear that the plaintiff cannot seek to affect the defendants with notice of Exhibit A-2 except by proving the alleged possession of the plaintiff from 1952, because that is the only averment in the plaint relevant on the question of notice to the defendants. When the plaintiff filed her suit, she must have been aware that her sale deed. Exhibit A-1, was later in point of time than the sale deed, Exhibit B-1, and that the only way the plaintiff could displace Exhibit B-1 was by relying on Exhibit A-2 and the notice thereof to the defendants. The only averment made on the question of notice to the defendants was the possession of the plaintiff from 1952. Hence it is obvious that on the question of notice to the defendants of Exhibit A-2, the only relevant fact which could be proved by the plaintiff is the possession of the plaintiff from 1952. It may be added that the plaintiff was aware of the necessity of proving that the defendants had notice of Exhibit A-2, because a question was put to the first defendant as D.W. 1 in cross examination that the defendants had knowledge of Exhibit A-2.

The position therefore is that learned Subordinate Judge was not justified in setting aside the judgment of the learned District Munsif and remanding the suit. See also the decision of this Court on Order 41, rule 23, Civil Procedure Code, quoted in *Chinnan Ambalam* v. *Ramiah Maniam*[1], and *Achammal* v. *Kistama Naidu*[2]. The learned Subordinate Judge should have disposed of the appeal with reference to

1. (1968) 81 L.W. 296. 2. (1968) 81 L.W. 291.

Order 41, rule 24, Civil Procedure Code. He should frame an additional issue whether the defendants had notice of Exhibit A-2, and in considering that question he could incidentally go into the question of the plaintiff's possession from 1952.

The Judgment of the learned Subordinate Judge is accordingly set aside and the appeal—A.S.No. 385 of 1964 is remanded to him for disposal according to law and Order 41, rule 24, Civil Procedure Code, and in the light of the observations contained in this Judgment. The appellants will get the costs of this appeal from the Respondent-Plaintiff. No leave.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P.S. KAILASAM.

Ramakrishna Reddiar .. .. *Petitioner**

v.

The Deputy Registrar of Co-operative Societies, Chingleput and another .. *Respondents.*

Madras Co-operative Societies Act (*LIII of* 1961), *sections* 28 (1) (b) *and* 28 (2) (a) *and rule* 40—*Scope—Governing body—Membership—Disqualification—Removal—Subsequent payment of arrears—Effect.*

Section 28 (2) of the Madras Co-operative Societies Act provides that a member of the committee shall cease to hold his office as such if he becomes subject to any of the disqualifications in sub-section (1). Reading sections 28 (1) (*b*) and 28 (2) (*a*) together, a member of the committee shall cease to hold office if he is in default for a period exceeding three months. Rule 40 (2) says that on the issue of an order under sub-rule (1), the member concerned shall cease to be a member of the committee (Governing Body). Rule 40 (1) enables the Registrar to direct the removal of a member, if such member is or has become disqualified to continue as a member. When once such an order is passed under section 28, the member shall cease to hold office from the date of disqualification and not from the date of the order. The payment of arrears subsequent to the disqualification would not in any way affect the question.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in R.C.No. 980 of 1968-D dated 10th July, 1968 on the file of the Deputy Registrar of Co-operative Societies, Chingleput and quash the order made therein.

T.R. Srinivasan, for Petitioner.

S.T. Ramalingam, for Government Pleader, for 1st Respondent.

R. Sundaravaradhan, for 2nd Respondent.

The Court made the following

ORDER.—This petition is filed by a member of the Governing Body of the Acharapakkam Co-operative Supervising Union against the order of the Deputy Registrar, holding that the petitioner had incurred the disqualification referred to in section 28 (2) (*a*) read with section 28 (1) (*b*) (*i*) of the Madras Co-operative Societies Act and directing his removal from membership of the Governming Body of the Acharapakkam Co-operative Supervising Union.

The petitioner borrowed from Acharapakkam Rural Bank two amounts of Rs. 1,000 which were payable on 30th April, 1967 and 8th October, 1967. The amounts were due for more than three months, and were paid on 18th January,

*W.P. No. 2580 of 1968. 12th November, 1968.

1968 and 23rd January, 1968. On a communication from another member of the Governing Body, the Deputy Registrar issued a notice on 23rd May, 1968 to the petitioner to show cause why he should not be removed from membership of the Governing Body of the Supervising Union. The petitioner gave an explanation on 18th June, 1968, stating that he had left instructions with the Secretary to adjust the moneys standing to his credit and that of his family for these loans and the Secretary failed to carry out his instructions. The Deputy Registrar conducted an enquiry after obtaining the explanation of the petitioner on 10th July, 1968, and ordered the removal of the petitioner from the Governing Body of the Acharapakkam Co-operative Union Limited.

Section 28 (1) is as follows :

"No person shall be eligible for being elected or appointed as a member of a committee if he—

(*a*) ....or

(*b*) (*i*) is in default to the society or to any other registered society in respect of any loan or loans taken by him for such period as is prescribed in the bye-laws of the society concerned or, in any case for a period exceeding three months."

On the facts, there is no dispute that the petitioner was in default for a period exceeding three months. Section 28 (2) provides that a member of the committee shall cease to hold his office as such if he becomes subject to any of the disqualifications mentioned in sub-section (1). Reading sections 28 (1) (*b*) and 28 (2) (*a*) together, a member of the committee shall cease to hold office if he is in default for a period exceeding three months. The disqualification will commence when the petitioner is in default for a period exceeding three months. The contention of the learned Counsel for the petitioner is that though the petitioner might have come by this disqualification, if the loans taken by the petitioner had been paid before the petitioner ceased to be a member by the orders of the Registrar under Rule 40, the disqualification will not attach to him and he will not cease to be a member. Rule 40 (1) of the Madras Co-operative Societies Rules, 1940, reads as follows :

"The Registrar may, by order in writing, direct the removal of a member of the committee from such membership, if, in the opinion of the Registrar, such member is or has become disqualified to continue as a member thereof under sub-sections (1) (2), (3) (4) or (5) of section 28."

The proviso to the rule requires that no member of the Committee shall be removed without that member being given an opportunity to make his representations. Rule 40 (2) says that on the issue of an order under sub-rule (1), the member concerned shall cease to be a member of the committee. Rule 40 (1) enables the Registrar to direct the removal of a member, if such member is or has become disqualified to continue as a member. Under section 28 (1) (*b*) read with section 28 (2) a member of the Committee shall cease to hold office if he is in default to the society for a period of three months. Under the section the member shall cease to hold office on the date when there had been default for three months and the subsequent payment will not in any way take away the disqualification. Learned Counsel placed much reliance on rule 40 (2) and submitted that a member will cease to be a member only on the date of the issue of the order under rule 40 (1) and that, before that time, if the payment had been made there is no default, and the member will not cease to be a member. This contention cannot be accepted. The question whether a person has come by a disqualification or not is for the Registrar to decide and when a member is or has become disqualified under section 28 (1) (*b*) read with section 28 (2), the Registrar has to take proceedings and issue an order as contemplated. When once such an order is passed under section 28, the member shall cease to hold office from the date of disqualification and not from the date of the order. Rule 40 (1) cannot over-ride the specific language of section 28. Whether a member has come by disqualification or not has to be decided by

the Registrar and when once it is decided that he had come by the disqualification, the ceasing from membership would be from the date of the disqualification. The payment of the arrears subsequent to the disqualification would not in any way affect the question.

The order of the Deputy Registrar is therefore correct and this petition is dismissed. No order as to costs.

V.M.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Management of Hotel Asoka, Madras, by partner L. G. Balakrishnan .. *Petitioner**

v.

The Labour Officer II, Madras and another .. *Respondent*

Madras Catering Establishments Act (XIII of 1958), section 19 (2)—Interpretation—Power of the appellate authority (Labour Officer)—Additional evidence, if could be taken.

The power of the appellate authority under section 19 (2) of the Madras Catering Establishments Act, 1958 should be construed in the widest manner possible so as to take in also the power to take additional evidence, where the needs of the case call for it. The appellate officer can come to a decision whether the evidence adduced had made out that the worker was guilty of misconduct alleged by the management. A reference to the impugned order shows that the Labour Officer in his turn weighed the evidence let in by the management and came to the conclusion that it did justify the finding of the domestic enquiry office.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of *certiorari* calling for the records in D.Dis. No. 1500 of 1965 dated 15th November, 1965-C. No. 19 of 1965, Labour Officer II, Madras and quash the same.

A. R. Ramanathan, for Petitioner.

R. Ganesan, for Respondent.

The Court made the following

ORDER.—The petitioner is the management of a hotel concern in Madras. It has filed this writ petition under Article 226 of the Constitution of India aggrieved against the order of the first respondent, the Labour Officer II, Mylapore, Madras, allowing the appeal of the 2nd respondent D. Kanthiraj, a worker in the hotel.

Though three charges were framed against the worker by the management at the domestic enquiry, it actually pressed against the worker only the charge that during working hours, he carried "on vigorous trade union activities within the premises of the hotel by holding unauthorised discussions with co-workers." Two witnesses were examined by the management in support of the charge and they were cross-examined. The worker also gave his explanation. The management accepted the finding of the enquiry officer that the worker was guilty of the charge and dismissed him from service. Relying upon the provisions of section 19 (2) of the Madras Catering Establishments Act, 1958, the worker appealed to the Labour Officer. That officer in the appeal held that the evidence adduced by the management in support of the charge was not reliable and was not sufficient to support the charge. He allowed the appeal and directed the management to reinstate the worker with continuity of service and payment of two months back wages. It is against this order that the present writ petition has been filed.

The scope of the power exercised by the Labour Officer functioning as the appellate authority under section 19 (2) of the Madras Catering Establishments Act, 1958

* W.P. No. 26 of 1966 — 15th November, 1968.

has been laid down by a Bench of this Court in *Srirangam Janopakara Bank* v. *Rangaraja*[1] where at page 226, it is stated that the power of the appellate authority under section 41 (2) of the Act (that decision dealt with the Madras Shops and Establishments Act and section 41 (2) of that Act is *in pari materia* with section 19 (2) of the Madras Catering Establishments Act, 1958) should be construed in the widest manner possible, so as to take in also the power to take additional evidence, where the needs of the case call for it. In the same decision it was held that no analogy can be drawn between the powers conferred on the Labour Court under section 41 (2) of the Shops and Establishments Act (or 19 (2) of the Madras Catering Establishments Act, 1958) and the power of a Labour Court while dealing with a reference under the Industrial Disputes Act to interfere with the decision of a domestic Tribunal. The power of interference in the latter case is much more restricted, namely, being confined to cases where the domestic tribunal has given a decision which amounts to victimisation or which is opposed to natural justice and is *mala fide* or amounts to an unfair labour practice. But the appellate power under the Madras Catering Establishment Act is definitely wider and the appellate officer can come to a decision whether the evidence adduced had made out that the worker was guilty of the misconduct alleged by the management. A reference to the impugned order shows that the Labour Officer in his turn weighed the evidence let in by the management and came to the conclusion that it did not justify the finding of the domestic enquiry officer. The first point on which the Labour Officer stressed is that the enquiry officer gave a finding that the worker had intimidated the other workers to join the union when none of the witnesses had spoken to such intimidation. Another finding of the enquiry officer was that the worker concerned carried on trade union activities without doing his normal work, and on this point also there was no evidence. The statement of the witnesses amounted to the worker casually conversing with them about starting a rival union, at a time when the worker and the witnesses were engaged in duties under the management. But there is no precise evidence that he carried on organised propaganda without attending to his normal work. It was for this reason that the Labour Officer seems to have made the comment that the enquiry officer was quick to draw an inference adverse to the worker without any support for it from the evidence, and that therefore his finding must be viewed as perverse. That apart, the Labour Officer has referred to other discrepancies in the evidence which made it unsafe to accept the evidence tendered in support of the charge. This method of approach to the evidence falls within the jurisdiction of the appellate authority functioning under section 19 (2) of the Madras Catering Establishments Act, 1958 and cannot be challenged in writ proceedings. The writ petition is dismissed. No order as to costs.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE R. SADASIVAM.

M. Lakshmanan Chettiar and another .. *Appellants**

v.

Palaniswami Chettiar and others .. *Respondents.*

Transfer of Property Act (*IV of* 1882), *section* 58 (a)—*Scope—Mortgage deed providing the maximum limit of advances—Mortgage deed, if could be enforced for the amounts advanced upto the maximum limit and also for the amount due by way of interest.*

If a person takes a loan on the security of immoveable property and the mortgage deed mentions, as it would naturally mention, the amount so lent as the amount secured by the mortgage, it could not be legitimately contended that the mortgagee cannot enforce the security for the accrued interest secured by the

1. (1964) 1 L.L.J. 221.

* App. No. 525 of 1962. 11th December, 1968.

documents on the ground that it has been mentioned in the mortgage deed that it is executed for the amount advanced.

A mortgage deed providing the maximum limit of advances can be enforced not only for the amounts advanced upto the said maximum limit, but also for the amount due by way of interest.

In the present case the plaintiff-appellants are entitled to enforce the claim for the amounts due to them under each of the bonds upto the maximum limit mentioned in the documents so far as the principal is concerned and the interest on the said advances irrespective of the fact that the total amount of principal and interest is in excess of the maximum limits mentioned in the documents.

Appeal against the decree of the Court of the Subordinate Judge (II Additional), Cuddalore in O.S. No. 146 of 1960.

R. Gopalaswamy Iyengar and *M. Srinivasan*, for Appellants.

S. Tyagaraja Iyer, V. Syamalam, K. Gopalachari and *K. Sarvabhauman*, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J.—Appellants filed the suit in the lower Court to recover Rs. 33,440 on three registered security bonds, Exhibits A-1 dated 1st November, 1957, Exhibit A-2 dated 4th September, 1948 and Exhibit A-3 dated 6th April, 1951, executed by the first defendant in their favour for Rs. 5,000, Rs. 10,000 and Rs. 3,000 respectively, hypothecating the properties covered by the plaint *A, B* and *C* Schedules respectively. The plaintiffs released some of the items of the hypotheca and sued to recover the amounts due to them from the remaining items alone, which are described in the plaint D Schedule. The security bonds were intended to cover future advances upto the limit mentioned in each and such advances were evidenced by promissory notes executed by the first defendant in favour of the plaintiffs. The learned Second Additional Subordinate Judge, who tried the suit, found that the security bonds, Exhibits A-1 to A-3 are true, that the promissory notes Exhibits A-4 and A-8 are fully supported by consideration that the arrangement pleaded by the first defendant in paragraph 4 of his written statement that by virtue of the plaintiffs being in possession of the properties covered by the nominal sale deed Exhibit A-32, dated 17th December, 1951 in favour of P.W. 2, Manickam Chettiar, the amounts due to the plaintiffs in respect of their dealings with him have been discharged, is not true, that the first defendant and his son the second defendant are not entitled to the benefit of Madras Act IV of 1938 and that in the result the appellants are entitled to the amount claimed by them; he however granted a mortgage decree only to the extent of Rs. 15,000 over items 1 and 2 of the plaint D Schedule in respect of the security bonds Exhibits A-1 and A-2 and a mortgage decree for Rs. 1,200 with interest over items 4 to 6 of the plaint D Schedule in respect of the security bond Exhibit A-3 on the ground that the security bonds could be enforced only upto the limit of the amounts mentioned therein and not in respect of the interest on the loans advanced; and that item 3 of the plaint D Schedule now owned by the third defendant cannot be proceeded against as it was released by an agreement between the plaintiffs and P.W. 2, Manickam Chettiar, the vendee under Exhibit A-32. Defendants 4 and 5 are only subsequent alienees. There is no appeal by any of the defendants.

The only two points urged by the learned Advocate for the appellants (plaintiffs) are that they are entitled to a mortgage decree in respect of the entire amounts claimed by them as the amounts claimed by them over and above the amounts secured under the documents Exhibits A-1 and A-2 represent only interest and that as they have not released the house, item 3 of the plaint D schedule, they are entitled to proceed against that item also.

The registered security bonds Exhibits A-1 to A-3 have been executed by the first defendant to secure future advances upto the limit of the amounts mentioned

therein and the security bonds could be enforced only for advances upto the maximum limit mentioned in the bonds. But the learned Second Additional Subordinate Judge has failed to note that though the plaintiff's are entitled to claim larger amounts, they have confined their claims to the principal amounts mentioned in Exhibit A-1 and A-2, and the interest thereon at 12 per cent per annum. The same question does not arise in respect of the third registered security bond, Exhibit A-3 as the plaintiffs have confined their claim to a sum of Rs. 1,200 in respect of the claim under that document. The maximum limit of future advances secured under the documents, Exhibits A-1 and A-2, could refer only to the principal amounts, and not to subsequent interest. It is meaningless to contend that if a person advances moneys upto the limit mentioned in the mortgage deed intended to secure future advances, he cannot claim a charge in respect of the interest on the ground that by so doing he would be exceeding the limit mentioned in the mortgage deed. The maximum limit fixed in the documents could refer only to future advances and not to future interest on the amount so advanced. A mortgage has been defined in section 58 (*a*) of the Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. In the latter part of section 58 (*a*) of the Act, it is stated that the principal money and interest of which payment is secured for the time being are called the mortgage money. If a person takes a loan on the security of immovable property and the mortgage deed mentions, as it would naturally mention, the amount so lent as the amount secured by the mortgage, it could not be legitimately contended that the mortgagee cannot enforce the security for the accrued interest secured by the documents on the ground that it has been mentioned in the mortgage deed that it is executed for the amount advanced. In *Allahabad Bank Ltd.* v. *Benaras Bank Ltd.*[1] the appellant-bank agreed to advance to the mortgagor a sum of Rs. 1,25,000 on the security of some properties and its was contended on behalf of the subsequent mortgagee, who filed the suit, that the appellant was entitled to priority under section 79 of the Transfer of Property Act only to extent of Rs. 1,25,000, and not for the subsequent interest. But it has been held in that decision that the appellant as the first mortgagee is entitled to priority as against the second mortgagee not only with respect to the principal advanced under the first mortgage, but also with respect to the interest on that amount and that section 79 of the Transfer of Property Act has no application in cases where no advance has been made by the prior mortgagee after the creation of the second mortgage. The principle of the decision shows that a mortgage deed providing the maximum limit of advances can be enforced not only for the amounts advanced upto the said maximum limit, but also for the amount due by way of interest.

The learned Second Additional Subordinate Judge has relied on the decision in *Jagannath* v. *Ramchandra*[2], in support of his finding that the plaintiffs cannot claim a mortgage decree for the amount exceeding the maximum limit fixed in the security bonds. A reading of the decision is sufficient to show that the principles enunciated therein can hardly be invoked to the suits on mortgages. It has been held in that decision that where the property is given by a third party in security for the due performance of decree in particular amount, the effect of the subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by the sale of the property specified therein and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of the transferee and will not bind him and such a sale can be set aside on the alienee depositing the amount due under the bond. The reasons for the decision is obvious, namely, that the security bond was for a fixed sum, unlike the security bonds in this case, which secure interest on future advances also. In fact, it is clear from Exhibit A-1 and A-2 that the documents commence

1. (1938) 36 All. L J. 658.
2. A.I.R. 1936 Mad. 589.

with the statement that they are mortgage deeds for the amounts of Rs. 5,000 and Rs. 10,000 respectively. In the body of the documents it is stated that the documents are intended to secure future advances to the extent of Rs. 5,000 and Rs. 10,000 respectively. But it is also clear from the body of the documents that the plaintiffs could recover the principal and interest on such advances on the security of the properties covered by Exhibits A-1 and A-2 and also by proceeding against the other properties of the first defendant. In fact, in the above decision it is pointed out that it has now been well settled by the Privy Council in *Raj Ragubar Singh* v. *Jai Indra Bahadur Singh*[1], that a security bond similar to the one in the suit given in favour of the Court does not constitute a mortgage within the meaning of the Transfer of Property Act so as to attract the procedure laid down in that Act and the consequent necessity of a suit to enforce it. The learned Advocates for defendants 1 and 2 was not able to advance any arguments to support the above decision of the learned Second Additional Subordinate Judge, which is obviously incorrect. We find that the plaintiffs-appellants are entitled to enforce the claim for the amounts due to them under each of the bonds upto the maximum limit mentioned in the documents so far as the principal is concerned and the interest on the said advances irrespective of the fact that the total amount of principal and interest is in excess of the maximum limits mentioned in the documents.

There is no registered document with regard to the alleged release of item 3 of the plaint D Schedule. It is stated in the middle of paragraph 15 of the judgment of the lower Court that it was pointed out on behalf of the "plaintiffs" that a release can even be oral (evidently the word 'plaintiffs' is a mistake for the word defendants). In the grounds of appeal, the fourteenth ground is that that the learned Judge erred in thinking that, there could be a valid release except by a registered instrument particularly when the properties involved were worth more than Rs. 100. A document of release of any right or interest in immovable property of the value Rs. 100 or upwards, would require registration under section 17 (1) (*b*) of the Registration Act. The lower Court relied on the decision in *Munuswami* v. *Govindaraja*[2], where it has been held that if there is a contract between a mortgagor and a mortgagee, it may be that under section 92 (4) of the Evidence Act, it should be in writing and then it should also be registered under the Registration Act. But where the contract to release is not between a mortgagor and a mortgagee, but between a mortgagee and a stranger who wants to purchase the property included in the mortgage, neither the transfer of property Act nor the Evidence Act applies, that is there An may be an oral release of the property intended to be purchased from the mortgagee. unreported judgment of Krishnan, J., in S.A. No. 797 of 1921, is referred to as laying down that there is no law in India whereby a release of mortgage should be in writing, and registered. It is open to a mortgagee to give up some items of the hypotheca, but it would not affect the rights of the purchaser of the other items of the hypotheca which are proceeded against to claim contribution from the person interested in the said items which are so given up. It is clear from the decision itself that if there is a contract of release between the mortgagor and the mortgagee, the document should be in writing by reason of section 92 (4) of the Evidence Act and that it should also be registered under the provisions of the Registration Act. It is, however, stated that where the contract to release is not between a mortgagor and a mortgagee, but between a mortgagee and an intending purchaser, the release can be oral. In such a case it is not a release in respect of immovable property as the person in whose favour the alleged document of release is executed had not, at that point of time any interest in the immovable property. The decision in such a case could easily be supported on the ground that when a mortgagee receives money from the intending purchaser of a portion of the hypotheca and orally gives up his security over the said property, he will be estopped from proceeding against that property. Sri K. Sarvabhauman appearing for the third defendant relied on the said decision in support of his contention that there was such an agreement between the plaintiff

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1. L.R. 46 I.A. 128 : 38 M.L.J. 302 : I.L.R. (1920) 42 All. 158 (P.C).

2. (1935) 68 M.L.J. 91 : I.L.R. 58 Mad. 371 : A.I.R. 1935 Mad. 113.

and P.W. 2 to release item 3 of the plaint D Schedule prior to the date of sale, Exhibit A-32, in favour of P.W. 2. We shall therefore, proceed to consider whether there was any such agreement in this case.

Item 3 of the plaint D Schedule is one of the items sold under Exhibit A-32 to to P.W. 2, Manicka Chettiar, P.W. 1, Alangaram Chettiar who has written several of the documents in this case, stated in his evidence that the plaintiffs agreed to release the items sold under Exhibit A-32 on payment of a consideration of Rs. 3,000 by P.W. 2 to the plaintiffs. But it is clear from his evidence that only Rs. 2,500 was paid and so the plaintiffs released other items but refused to release the house, item 3 of the plaint D Schedule. It is significant to note that the released deed Exhibit A-42, dated 27th March, 1953, which is not a registered document, does not include item 3 of the plaint D Schedule. It is true P.W. 2 Manicka Chettiar admitted in cross-examination that he purchased the properties under Exhibit A-32 only on the understanding that the plaintiffs would release them from the security bonds. But he stated in re-examination that in spite of the agreement, the house was not released because of the subsequent proceedings. It is clear from his evidence that the plaintiff in O.S. No. 101 of 1951 on the file of the District Munsif Court, Kallakurichi attached the said house property and brought it to sale in September, 1957 and one Velayudha Pillai as Court auction-purchaser took delivery of the property through Court P.W. 2, Manicka Chettiar applied for re-delivery in the District Munsif Court, Kallakurichi, but his application was dismissed on 18th July, 1958. It is from the said Velayudha Pillai the third defendant has purchased the house, item 3 of the plaint D Schedule. There is really nothing in the documents filed in this case to show that item 3 of the plaint D Schedule was also released as per the agreement between the plaintiffs and P.W. 2. Though Exhibit A-42 dated 27th March, 1953 is not registered, the plaintiffs have excluded the items mentioned therein in asking for a mortgage decree. It is true the plaintiffs agreed to release item 3 of the plaint D Schedule also on payment of Rs. 3,000 by P.W. 2, Manicka Chettiar, but as the said amount was not paid in full, item 3 of the plaint D Schedule was not released. It is likely that having regard to the attachment and sale proceedings taken by the decree-holder in O.S. No. 101 of 1951 on the file of the District Munsif Court, Kallakurichi, P.W. 2 was not evidently interested in getting item 3 of the plaint D Schedule released and he secured the release only in respect of the other tiems covered by Exhibit A-42.

Sri K. Sarvabhauman appearing for the third defendant urged that as the third security bond Exhibit A-3 dated 6th April, 1961 came into existence when the house property was under attachment before judgment made on 8th March, 1951, in O.S. No. 101 of 1951, District Munsif Court, Kallackurichi, his rights as a transferee from the auction-purchaser would prevail over the mortgage on account of *lispendens* and the provisions contained in section 64, Civil Procedure Code. But it is clear from the prayer in the plaint that in respect of the amount claimed under the security bond Exhibit A-3, a mortgage decree is prayed for only against items 4 to 6 of the plaint D Schedule and not item 3 of that schedule. Hence, this objection cannot prevail and it was not pressed.

It is clear from a scrutiny of Exhibits A-1 and A-2 that item 3 of the plaint D Schedule has been included only in Exhibit A-2 and not in Exhibit A-1. The lower Court should have passed separate mortgage decrees in respect of the claims under each of the documents, Exhibits A-1 and A-2. The plaintiffs cannot enforce the security bond Exhibit A-1 against item 3 of the plaint D Schedule as it was not included in Exhibit A-1. We direct the decree to be amended so that the plaintiffs would be entitled to proceed only against items 1 and 2 of the plaint D Schedule with regard to the amount claimed under Exhibit A-1 and against items 1 to 3 of the plaint D Schedule so far as the amount due under Exhibit A-2 is concerned.

For the foregoing reasons the appeal is allowed as prayed for, but subject to this modification, that there shall be separate mortgage decrees in respect of Exhibits A-1 and A-2 also. The appellants are entitled to cost of this appeal.

V.M.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Sowdammal *alias* Sundarammal .. *Appellant**

v.

Veerammal and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rules* 23 *and* 27 (*Mad.*)—*Remand under rule* 23 *when justified—Scope of rule* 27.

It is clear from the scheme of the rules that generally speaking only where it is not possible to apply Order 41, rules 24 to 27, a remand should be resorted to under Order 41, rule 23. It should be noted further that before remanding the case, Order 41, rule 23 itself contemplates that the appellate Court should reverse or set aside the decree. Reading the rules together, this provision will not apply to a case where the trial Court has considered the entire evidence but in the opinion of the appellate Court, a different view ought to be taken of the evidence and the appellate Court is in a position to come to a finding on the evidence on record. In such a case, it is the duty of the appellate Court to consider the matter as it stands and give its own finding in reversal of the finding of the trial Court. But that would not justify a remand.

The provisions of Order 41, rule 27 should be strictly complied with by the appellate Court. In the instant case it being common case, that the parties were not prevented from adducing any evidence, the only test that should be applied by the appellate Court, is whether the appellate Court itself requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. As has been pointed out in a number of decisions, the appellate Court should come to a finding on that question and this finding could only be after considering the entire evidence already on record.

Appeal against the order of the Subordinate Court, Coimbatore, in A.S. No. 52 of 1965—O.S. No. 418 of 1963, District Munsif Court, Coimbatore.

P. S. Balakrishna Ayyar and *P.S. Ramachandran*, for Appellant.

M. R. Narayanaswami, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff against an order of remand made by the learned Subordinate Judge of Coimbatore. The main contest between the parties is whether the house in respect of which partition was sought was the joint family property of Sreeranga Chettiar, the deceased father-in-law of the plaintiff or his separate property. If it was joint family property, the plaintiff would have a larger share than if it was a separate property, because if it was joint family property the plaintiff's deceased husband Nanjappa Chettiar would in his own right have been entitled to one-third share and the plaintiff would be further entitled to the share of Sreeranga Chettiar along with the others. The learned District Munsif, who tried the suit, on a consideration of the evidence, accepted the case of the plaintiff. On appeal preferred by the first defendant, the learned Subordinate Judge felt some difficulty in deciding the case and he thought that in the interests of justice, the suit should be remanded to the trial Court to allow both parties to let in more satisfactory evidence. Actually an endorsement was made by the learned Counsel for the defendants in the trial Court that the defendants were not adducing any oral evidence. The only document that was marked on their side was Exhibit B-1. Still a complaint was made in the grounds of appeal that the defendants were not allowed sufficient opportunity to adduce evidence and actually I.A. No. 269 of 1965 was field to receive as additional evidence some receipts for payment of house tax in the name of Sreeranga Chettiar. With reference to these, the learned

*A.A.O. No. 322 of 1966. 13th December, 1968.

Subordinate Judge recognised that in view of the endorsement on the plaint by the learned Counsel for the defendants, he was unable to hold that the appellant was denied any opportunity by the trial Court to adduce evidence. But in view of his earlier inclination to remand the suit, he observed that it was a fit case for remand even apart from I.A. No. 269 of 1965. He formally allowed I.A. No. 269 of 1965 on the first defendant paying Rs. 35 to the other side.

The order of remand is opposed to the terms of Order 41, rule 23, Civil Procedure Code, as amended by this Court and uniformly interpreted by decisions of this Court. Note: *Veeramma* v. *Laksymayya*[1], *Chettiah Mudaliar* v. *Govinda Pandithan*[2], *Thirumalaiswami Mudali* v. *Periasami Mudali*[3], *Ramakrishna* v. *Rangayya*[4], *Amhed Rowther* v. *Bathumal Beevi*[5], *Balasubramania Aiyar* v. *Subbiah Thevar*[6], *Chinnam Ambalam* v. *Ramiah Maniam*[7], *Achammal* v. *Krishtama Naidu*[8], *Subramania* v. *Kaliammal*[9], Order 41, rule 23, as amended in Madras, states—

> " Where the Court from whose decree an apeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed on appeal, or where the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the Appellate Court may by order remand the case.........."

This is the only provision for remand. The following four rules, Order 41, rules 24, 25, 26 and 27, deal with a situation where the appellate Court has to keep the appeal on its file and dispose it of. Order 41, rule 24 deals with a case where the evidence on record is sufficient to enable the appellate Court to pronounce judgment; the appellate Court may, after re-settling the issues finally determine the suit. Order 41, rule 25 deals with a case where it is necessary to take additional evidence on the fresh issues which are to be framed by the appellate Court. The appellate Court may have the evidence recorded and findings submitted by the trial Court but should dispose of the appeal itself finally. Order 41, rule 27 deals with a situation where the parties were prevented from adducing necessary evidence before the trial Court and with a case where the appellate Court itself wants fresh evidence to be recorded. There again the appellate Court has to keep the appeal on its file. It is therefore clear from the scheme of the rules that generally speaking only where it is not possible to apply Order 41, rules 24 to 27, a remand should be resorted to under Order 41, rule 23. It will be noted further that before remanding the case, Order 41, rule 23 itself contemplates that the appellate Court should reverse or set aside the decree. Reading the rules together, this provision will not apply to a case where the District Munsif has considered the entire evidence, but in the opinion of the appellate Court, a different view ought to be taken of the evidence and the appellate Court is in a position to come to a finding on the evidence on record. In such a case, it is the duty of the appellate Court to consider the matter as it stands and give its own finding in reversal of the finding of the trial Court. But that would not justify a remand. Here it will be noted that the learned District Munsif did not shut out any evidence and he considered the evidence including Exhibit B-1 which was relied on strongly by the defendants. It may be that he was wrong in his appreciation of the evidence, but that by itself would not justify a remand and the learned Subordinate Judge was not justified in allowing the parties to fill up any lacuna in the evidence unless the strict conditions of Order, 41, rule 27, were satisfied.

So far as I.A. No. 269 of 1965 is concerned, *prima facie* the explanation of the first defendant contained in the affidavit filed in support of the application may be

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1. (1948) 1 M.L.J. 427 : A.I.R. 1948 Mad. 488.
2. (1948) 2 M.L.J. 413 : A.I.R. 1949 Mad. 394.
3. (1951) 2 M.L.J. 532 : A.I.R. 1952 Mad. 66.
4. A.I.R. 1954 Mad. 783.
5. (1960) 1 M.L.J. 37.
6. I.L.R. (1964) 2 Mad. 586 : A.I.R. 1965 Mad. 417 : 78 L.W. 105.
7. (1968) 81 L.W. 296.
8. (1969) 1 M.L.J. 126 : (1968) 81 L.W. 291.
9. (1968) 2 M.L.J. 548.

accepted, namely, that even though copies of tax receipts were applied for, the copies were obtained only after the trial of the case was over. There may be no objection to the reception of these tax receipts and indeed Sri P. S. Ramachandran, learned Counsel for the appellant, submits before me that the plaintiff may have no objection to the reception of these tax receipts because in his view they will not advance the case of the defendants. Any how, I am not inclined to interfere with the reception of the additional evidence in I.A. No. 269 of 1965, namely, the tax receipts, and the oral evidence which will be necessary to prove them. But beyond that, the provisions of Order 41, rule 27 should be strictly complied with by the appellate Court. It being common ground that the parties were not pervented from adducing any evidence, the only provision that should be applied by the appellate Court, is whether the appellate Court itself requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause. As has been pointed out in a number of decisions, the appellate Court should come to a finding on that question and this finding could only be after considering the entire evidence already on record. Beyond this, it is not desirable for me to say anything about the merits of the case.

Accordingly the order of the learned Subordinate Judge dated 17th September, 1966 is set aside subject to the reservation in respect of I.A. No. 269 of 1965 as observed herein. The learned Subordinate Judge will keep the appeal on his file and dispose of the appeal according to law. Leave refused.

V.K. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE S. GANESAN

Kaka Hajee Md. Ishaque Sahib .. *Petitioner**

v.

Kaka Md. Saddiq Sahib and others .. *Respondents.*

Madras Court-Fees and Suits Valuation Act (XIV of 1955), *sections* 25 (a) *and* 40—*Applicability.*

The law on the subject of cancellation of instruments is fairly clear. Normally a transaction will bind a person if he or persons under whom he derives title are *eo nomine* parties to the same, and must be set aside before any relief is claimed thereunder. This, however, is subject to two important exceptions: (1) where the transaction is only a sham and nominal one, not intended to be given effect to and (2) where the transaction is void in law. It necessarily follows that (*i*) transactions to which a person or persons under whom the said persons derive title are not *eo nomine* parties; (*ii*) transactions which are challenged as sham and nominal and (*iii*) transactions which are void *ab initio* are not legally binding in character need not be cancelled and set aside, before any claim is made thereunder.

Where therefore a suit is filed by the plaintiff for a declaration of his title to the suit property and for khas possession from the alienees, alleging that the alienees acquired the property under a sale deed executed by a person who had no title to the same as he had acquired it under a sham and nominal deed of gift executed by the plaintiff, the plaintiff can succeed in the suit without asking for cancellation of the deed of gift or the deed of sale. Such a suit would be governed by section 25 (*a*) and not by section 40 of the Madras Court-Fees Act for the purpose of payment of Court-fee.

Case law discussed.

Petition under section 115 of Act V of 1908, praying the High Court to revise the endorsement dated 4th October, 1966 on S.R. No. 1248 of 1966—(un-numbered suit of 1966) Sub-Court, Tirupattur.

* C.R.P. No. 1129 of 1967. 18th March, 1969.

V. V. Raghavan, for Petitioner.

The Additional Government Pleader, for Respondents.

The Court made the folllowing

ORDER.—The plaintiff in an un-numbered suit of 1966 pending in the Court of the Subordinate Judge of Tirupattur had filed this revision petition against the order passed by the learned Subordinate Judge, which is to the effect that, as in substance, the suit is one for cancellation of the documents, Court-fee under section 40 of the Madras Court-Fees and Suits Valuation Act, 1955, has to be paid.

The allegations in the plaint are that the plaintiff is the absolute owner of the suit properties; that, in order to save the properties from the reach of creditors and Incomte-tax Department, he executed a sham and nominal instrument of deed of gift (*hiba*) dated 24th April, 1956 in favour of his son, the first defendant and others who were then minors without any intention to transfer the title; that, in any event, the gift deed is void in law as it had not been accepted by any competent person and as no possession was delivered; that the second defendant, by playing fraud on the first defendant who had no title to the A Schedule properties comprised under the gift deed, obtained a sale of those properties from the latter; that the sale deed is void and that defendants 3 and 4 and similarly obtained a sale deed dated 6th March, 1961 comprising some of the suit properties. On these allegations the plaintiff has prayed (1) for a declaration of his title to the suit properties and (2) for possession of the same and has paid a sum of Rs. 377 as Court-fee under section 25 (*a*) of the Madras Court-Fees Act. The learned Subordinate Judge has held that, in substance, the suit is one for cancellation of the instruments of sale and that the petitioner should have paid Court fee on that basis under section 40 of the Madras Court-Fees Act. The question is whether this order can be upheld.

In *Sahul Hameed Rowther* v. *Mohideen Pichai*[1], a Division Bench of this High Court has ruled that, where a plaintiff alleged that a sale deed executed by him in favour of the defendant was sham and nominal, it was not necessary for him to pray for cancellation of the deed. The learned Judges have observed that, in such cases, where the sham and nominal character of the transaction is proved, title will not pass by that document and that those transactions are not insuperable obstacle to the granting of the plaintiff's prayer and they have also observed incidentally that, in such cases, there was no necessity even to ask for a declaration that the transactions were sham and nominal and that the plaintiff could have ignored the deed in the plaint and could have asked merely for injunction or possession as the case might be; and that it was open to the plaintiff to point out to the Court in the course of the trial that the transaction was only sham and nominal.

In *Unni* v. *Kunchi Amma*[2], the following observations occur :

> "If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non-existent and sue for their right as if it did not exist."

The same principle have been distinctly laid down by the Privy Council in *Bijoy Gopal Mukjerje* v. *Krishna Mahishi Debi*,[3]. In that case a reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for *khas* possession. The plea that there must have been a prayer for setting aside the lease was negatived in emphatic terms; and it was further held that, even if the plaint, in such cases contained a prayer for declaration or cancellation, it must be held to be purely incidental and not a necessary relief and that in such a case it was open to the plaintiff to treat the lease as a nullity without intervention of any Court.

1. (1948) 1 M.L.J. 270 : I.L.R. (1948) Mad. 883.
2. (1891) I.L.R. 14 Mad. 26.
3. (1907) 1 L.R. 34 Cal. 329

In *Vellayya Konar* v. *Ramaswami Konar*[1], Wadsworth, J. laid down the law broadly as follows :

> " When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get the decree or deed cancelled or declared void *in toto*."

In *Ramaswami* v. *Rangachariar*[2], the majority of Judges of a Full Bench of this Court have held that :

> " Where the plaintiff was not bound under the substantive law by which he was governed to sue for declaration or cancellation in respect of any of the transactions a prayer for declaration or cancellation in such cases even if the plaint contained will be one for a purely incidental, but unnecessary relief."

In *Appanna* v. *Venkatappadu*[3], a Division Bench of this Court, while dealing with Article 91 of the Limitation Act, which is concerned with suits for cancellation, had observed that where under the law there is no duty cast on the person to get an instrument set aside, for example, in the case of an instrument, which is void *ab initio*, that Article did not impose any obligation on him to get it set aside.

The law on the subject of cancellation of instruments is thus fairly clear. Normally a transaction will bind a person if he or persons under whom he derives title are *eo nomine* parties to the same, and must be set aside before any relief is claimed thereunder. This, however, is subject to two important, exceptions: (1) Where the transaction is only a sham and nominal one, not intended to be given effect to; and (2) Where the transaction is void in law. It necessarily follows that (1) transactions to which a person or persons under whom the said persons derive title are not *eo nomine* parties; (2) transactions which are challenged as sham and nominal and (3) transactions which are void *ab initio* are not legally binding in character need not be cancelled and set aside, before any claim is made thereunder. The reason is fairly obvious. In the first group of cases, there can be no difficulty, as it is an elementary principle of law that transactions to which a person or persons under whom the said person derives title are not parties cannot bind them. In the case of sham and nominal or void transactions comprised in the second and third group of cases, title has not passed to the transferees. Prayer for setting aside such transactions will be superfluous and the plaintiff will be entitled to ignore them altogether. The case is otherwise in respect of voidable transactions and benami transactions. In such cases the law will uphold the ostensible title conferred by those instruments; and the said title will prevail until the transactions are challenged with success by seeking appropriate reliefs declaratory or otherwise in Court of law.

The question for consideration in the first place, is whether the petitioner is bound to ask for cancellation of the instruments of sale dated 10th July, 1961 and 6th March, 1961. It is true that there is an allegation that both these instruments are tainted by fraud; but that allegation in my view is only ancillary and the main emphasis is laid on the fact that those instruments had been executed by the first defendant, a minor who had really acquired no title under the instrument of Hiba (gift). The sum and susbtance of the attack is that these instruments of sale are void *ab initio*, in that they have been executed by the first defendant who had no title in himself. As the allegation is that the two transactions of sale are void *ab intio*, it necessarily follows that the petitioner is not bound in law to sue for cancellation of those instruments in the suit.

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1. (1939) 2 M.L.J. 400 : I.L.R. (1940) Mad. 259.
2. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 73.
3. (1953) 1 M.L.J. 476 : (1953) 66 L.W. 304.

The second point relates to the instrument of Hiba, dated 24th April, 1956. Admittedly the petitioner is *eo nomine* a party to the instrument of Hiba now attacked by him ; but then the transaction of gift is attacked as sham and nominal and also void. It is clear that, if the allegation is proved, the petitioner would succeed in the suit without asking for cancellation of this instrument also.

The suit as laid for declaration of the petitioner's title and for khas possession is properly valued under section 25 (*a*) of the Madras Court-fees Act and no additional Court-fee need be paid under section 40.

The revision petition is therefore allowed.

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

P.R.V.R. Veerappa Chettiar .. *Petitioner**

v.

State of Madras and another .. *Respondents.*

Madras District Municipalities Act (V of 1920), sections 345 and 331, Schedule IV, rules 29, 30 and 36—Prosecution for alleged wilful default of payment of property tax—Limitation—Service of notices under the Act—Mode.

Under section 345 of the District Municipalities Act the prosecution for alleged non-payment of tax must be instituted in respect of the sum due, within three years from the date on which prosecution might first have been commenced. It is clear from rule 30 (2) that prosecution cannot be instituted against the defaulter unless it was found that the distraint of the defaulter's property is impracticable. So the condition precedent for instituting prosecution after the amount has become due is the commencement of distraint proceedings and consequent finding that such a distraint is impracticable. To commence distraint proceedings, it is necessary under rule 29that a bill shall be served on the person from whom the amount is due. Under rule 30 (1) if the amount due is not paid within fifteen days from the service of the bill the amount can be recovered by distraint and sale of the moveable property of the defaulter. It is therefore clear that after the amount is due and after the bill has been served, the Executive Authority shall wait for fifteen days and if the amount due is not paid within that time, the distraint proceedings can be taken. The practicability or otherwise of the distraint proceedings has [to be considered only after the expiry of fifteen days after the service of the bill on the defaulter. As such, the first date on which the prosecution can be instituted in respect of the alleged default must necessarily be after fifteen days after the bill was served, when only the distraint could be made and when a finding in respect of the impracticability of distraint proceedings can be made.

The method of serving notices is provided under section 331 of the Act. One of the modes provided there is by giving or tendering the notice to the person concerned.

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the Judgment of the Court of the Distric Magistrate (*J*), Ramanathapuram at Devakottai dated 17th November, 1966 and made in C.A. No. 176 of 1966 (C.C. No. 1657 of 1966 on the file of the Court of the Sub-Magistrate, Karaikudi).

G. N. Chary, for Petitioner.

The Assistant Public Prosecutor, for State.

R. Krishnamurthi for *M/s. G. Ramanujam* and *P. Venkataraman*, for 2nd Respondent.

* Crl R.C. No. 1721 of 1966.
(Crl. R. P. No. 1689 of 1966.) 27th September, 1968.

The Court made the following

ORDER.—The revision petitioner was convicted under Rules 30 (2) and 36 of Schedule IV of the District Municipalities Act, 1920 (hereinafter called 'the Act') for alleged wilful default of payment of property tax due from him and was sentenced to pay a fine of Rs. 20 and was further directed to pay the house tax of Rs. 600-86P., by the Sub-Magistrate, Karaikudi in C.C.No. 1657 of 1966. On appeal, the District Magistrate, Ramanathapuram at Devakottai, confirmed the conviction and sentence.

The learned counsel appearing for the petitioner raised two points, namely, that the prosecution was not maintainable as it was barred by limitation in respect of the alleged default of payment of property tax for the first half year 1963-64 and secondly, that in respect of the prosecution for the second half year, the procedure prescribed in Rule 29 of the Act in that, the notice required under that Rule was not proved to have been served and that, therefore, the prosecution for the second half year was also not maintainable.

To appreciate the contentions of the learned Counsel, the following relevant facts and the appropriate provisions of the Act have to be considered.

The revision petitioner is the owner of house No. 72 P in Ward 12, Amman Sannadhi Street, Karaikudi. He has to pay Rs. 300-37 P. as property tax to the Karaikudi Municipality for each half year. It is the case of the prosecution that for both the half years of 1963-64, he has not paid the tax amounting to Rs. 600-86 P. The demand notice as required under Rule 29 of the Act was served on the petitioner on 25th July, 1963 for the first half year and the demand notice for the second half year was served on 14th February, 1964. Since the revision petitioner did not pay the arrears in spite of demand notices, the Commissioner issued warrant to the Revenue Inspector to distraint the moveable properties belonging to the petitioner. On 10th May, 1966, the Revenue Inspector proceeded to the house of the petitioner to distrain his moveable properties. Since the petitioner prevented him from distraining the movables, the Revenue Inspector sought the assistance of the Police and a Police Constable was deputed for his assistance. As the petitioner again obtructed him, he felt it was unsafe to proceed with the distraint as there would be breach of the peace and so he came back without effecting the distraint. In the result, it was found that the distraint had become impracticable and hence the prosecution was instituted on 11th May, 1966 for wilful default of payment of property tax for the first and second half years of 1963-64. On these facts, it will be necessary to note the relevant provisions of the Act.

Under section 86 of the Act, the Property Tax shall be levied every half year and shall be paid by the owner of the assessed premises within thirty days after the commencement of the half year. So, under this section, the petitioner should have paid the amount due for the first half year within 1st, May, 1963 and the amount due for the second half year within 1st November, 1963. If the amount is not paid within the time, the said amount can be recovered either by filing a suit or instituting distraint proceedings or prosecution in a criminal Court. Section 345 of the Act provides limitation for recovery of dues and it reads thus :

> " No distraint shall be made, no suit shall be instituted and no prosecution shall be commenced in respect of any sum due to the Municipal council under this Act after the expiration of a period of three years from the date on which distraint might first have been made, a suit might first have been instituted, or prosecution might first have been commenced, as the case may be, in respect of such sum."

We are now concerned with the prosecution provided under section 345. The prosecution must be instituted in respect of the sum due, within three years from the date on which prosecution might first have been commenced. The question that arises for consideration is as to when in the present case, the prosecution might have been instituted or in other words, what is the first date on which the complaint can be filed before a Magistrate in respect of the amount due.

It is clear from Rule 30 (2) that prosecution cannot be instituted against the defaulter unless it was found that the distraint of the defaulter's property is impracticable. So, the condition precedent for instituting prosecution after the amount has become due is the commencement of distraint proceedings and consequent finding that such distraint is impracticable. To commence distraint proceedings, it is necessary under Rule 29 that a bill shall be served on the person from whom the amount is due and such bill shall be signed by the executive authority and shall contain a statement of the period and a description of the location of property for which the tax is charged and a notice of the liability incurred in default of payment. Under Rule 30 (1), if the amount due is not paid within fifteen days from the service of the bill, the amount can be recovered by distraint and sale of the movable property of the defaulter under the warrant of the Executive Authority. It is, therefore, clear that after the amount is due and after the bill has been served, the Executive Authority shall wait for fifteen days and if the amount due is not paid within that time, the distraint proceedings can be taken. The practicability or otherwise of the distraint proceedings has to be considered only after the expiry of fifteen days after the service of the bill on the defaulter. As already noted, the institution of the prosecution depends upon the impracticability of distraint proceedings. As such, the first date on which the prosecution can be instituted in respect of the alleged wilful default must be necessarily after fifteen days after the bill was served, when only the distraint could be made and when a finding in respect of the impracticability of distraint proceedings can also be made.

Then again, it will depend upon the question as to when the distraint might first have been made as stated in section 345 of the Act. Can it be said that, after the amount became due, say in this case, the 1st May, 1963 for the first half year, the executive authority could take distraint proceedings at any time, within a period of three years, and, if so, whether the prosecution has to be commenced after the proceedings for distraint are taken? If the answer is in the affirmative, then it will lead to this position, namely, that the distraint proceedings could be taken after giving due notice, as required under Rule 29, even on the last day before the expiry of three years, if that were so, the prosecution could be instituted within three years after such distraint proceedings are taken and if such distraint became impracticable. The result will be that in such case, before six years from the date of the amount due, the prosecution can be instituted. I do not think that that is the intention of the Legislature. To me, the words found in section 345 namely, "a period of three years from the date on which distraint might first have been made" appear to be the date when it is possible to take distraint proceedings. If the amount becomes due on 1st May, 1963 for the first half year, under Rule 29, a bill can be served on the date the amount had become due and distraint proceedings can be taken after 15 days after the service of the notice. The possibility of instituting distraint proceedings in such a case will arise on 16th May itself. That is the date which must be taken as the date on which the distraint might for the first time be made. If this position is accepted, in this case the notice as required under Rule 29 must have been issued on 2nd May, 1963 and it could have been found whether the distraint was impracticable or not on 16th May, 1963, namely, 15 days after the service of the notice or even if a reasonable margin is given for actual service of the bill, that time taken for service may be taken into consideration for the commencement of the period of limitation. Even taking the extreme view against the prosecution that the finding of impracticability for the first time at least should have been given for the first half year on 16th or 17th May, 1963 the prosecution would be within time, as the complaint was filed on 11th May, 1966, within three years of the date when the prosecution might first have been commenced. I, therefore, hold that the prosecution in respect of the first half year was within time and it is not barred by limitation.

In respect of the second point raised with regard to the second year that the notice contemplated under Rule 29 was not duly served, I do not find any substance in it. The finding of the lower Courts is that notices under Rule 29 were served on both the petitioners, on 25th July, 1963 for the first half of 1963-64 and, on 14th

February, 1964, for the second half of 1963-64. But the revision petitioner has denied the tender of these notices to him and stated that there was enmity between the Municipalitiy and himself and that because of that enmity, the distraint proceedings, were taken without serving notice, This contention of the petitioner was negatived by the lower Courts, and, in my opinion, rightly. The method of serving notices is provided under section 331 of the Act. One of the modes provided there, is by giving or tendering the notice to the person concerned. This was what was done in this case. In fact, it is the case of the prosecution that when distraint proceedings were actually taken on 10th May, 1963, the petitioner was present and he successfully prevented the officrs from completing the distraint proceedings. There is nothing to show that he protested to the distraint proceedings being taken on the ground that no prior notice was given to him. I, therefore, find this point also against the petitioner.

In the result, the revision petition is dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M. NATESAN.

Nallanna Gounder .. *Appellant**

v.

Muthuswamy Gounder and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (*XXV of* 1955)—*Government Grants Act* (*XV of* 1895), *section* 3—*Grant of lease by Government—Lessee if can seek protection from eviction under Madras Act XXV of* 1955 *after the expiry of lease under the Government grant—Scope of section* 3 *of Government Grants Act.*

A lessee of agricultural land from the Government could, against the claim for possession by the Government of the expiry of the lease, rely upon and claim protection under the provisions of the Madras Ciltivating Tenants' Protection Act, 1955. The State cannot centend that by virtue of section 3 of the Government Grants Act, the provisions, restrictions, conditions and limitations of the lease deed ought to prevail over the statutory rights conferred on tenants under Madras Act XXV of 1955. The decision of the Judicial Committee in *Jagannath Baksh* v. *United Provinces*, (1946) 2 M.L.J. 29 : A.I.R. 1946 P.C. 127, as to the limited scope of section 3 has been followed by the Supreme Court in *Collector of Bombay* v. *Nusserwanji*, (1955) S.C.J. 339 : A.I.R. 1955 S.C. 298, and the position now is, therefore, beyond question that section 3 of the Government Grants Act saves a Government grant only in respect of provisons, restrictions, conditions and limitations over, which would be hit by the Transfer of Property Act.

Murugesa Gramani v. *Province of Madras*, (1946) 2 M.L.J. 171 ; *Ullatluthadi Chovi* v. *Secretary of State for India*, (1921) 41 M.L.J. 494 and *Kallingal Moosa Kutti* v. v. *Secretary of State for India*, (1920) I.L.R. 43 Mad. 65, 37 M.L.J. 332., Held no longer good law.

Nor can the state claim exemption from Madras Act (XXV of 1955) on the ground of the archaic preregative and immunity of the " Crown " from operation of statutes. The State is no longer a sovereign who has to hug at prerogatives and cling to exemptions. We have now a democratic republic, a service State with the ultimate severeignity vested in the State. The position now therefore is that a statute applies to State as much as it does to a citizen unless it expressly or by necessary implication exempts the State from its operation.

Appeal against the decree of the Court of 1st Additional Subordinate Judge, Tiruchirapalli in Appeal Suit No. 221 of 1963, preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 499 of 1960.

* S.A. No. 482 of 1964. 6th September, 1968.

S. Palaniswamy and *R. Kallappan*, for Appellant.

The Additional Government Pleader, for Respondents.

The Court delivered the following

JUDGMENT.—This Second Appeal raises the interesting question whether a lessee of agricultural land from the Government could, against the claim for possession by the Government on the expiry of the lease, rely upon the provisions of the Madras Cultivating Tenants' Protection Act (Act XXV of 1955). The State claims immunity and exemption from the provisions of the statute hereinafter referred to as the Act, and the Courts below have accepted the claim of the State.

The suit property, river Padugai Poramboke land of an extent of 3 acres and 25 cents, in Senappiratti Village, Katur Taluk, was leased out by the Tahsildar acting for the State Government by Public auction to the plaintiff for a period of three Faslis commencing from Fasli 1353. On the expiry of the period of lease, again, at a public auction the plaintiff became the lessee of the land for Faslis 1365 to 1368. Taking the lease, the plaintiff duly executed a Muchlika on 3rd January, 1958 in favour of the Tahsildar, agreeing to pay the rent for the three Faslis and undertaking to surrender possession of the suit land after the expiry of the lease. When on the expiry of the 2nd lease period, the Tahsildar announced public auction of the leasehold right, the plaintiff objected to the auction being held, submitting that he was a cultivating tenant entitled to the benefits of the Act. Over-ruling this objection, the auction was proceeded with, and the 1st defendant in the suit out of which the second Appeal arises, became the successful bidder at the auction, of the leasehold right. However, he could not get possession, in view of the contention put forward by the plaintiff. Apprehending forceful eviction, the plaintiff filed the suit, now under consideration, for a declaration that he is entitled to the benefits conferred on cultivating tenants under the Act and for an injunction against the defendants from interfering with his possession of the suit land. The Court below, relying on certain early decisions of this Court prior to independence, and applying section 3 of the Government Grants Act (Act XV of 1895), would uphold paramountcy of the provision in the lease deed of the plaintiff that he should surrender possession of the land at the expiry of the lease period, over the provisions of the Act, granting a cultivating tenant immunity from dispossession on certain conditions.

Two questions were argued before me : (1) Claim of immunity of the Government from the operation of a Statute unless the statute in express terms or by necessary implication bound the Government and (2) the paramountcy of the terms in a Government grant notwithstanding anything contained in any statute or enactment of Legislature, by virtue of section 3 of the Government Grants Act.

It is not disputed that the plaintiff could claim to fall within the definition of a cultivating tenant under the terms of Madras Act XXV of 1955, if the Act could be availed of by him against the State. His claim that he took lease of the land for the purpose of agriculture for personal cultivation and was carrying on personal cultivation of the land, was not put in issue. Admittedly there was a tenancy agreement between the plaintiff and the State. Having entered on the land under the tenancy agreement, he is continuing in possession of the land after termination of the tenancy agreement. If the Act applied, under section 3 of the Act he cannot be evicted from his holding or any part thereof, by or at the instance of the landlord, whether in execution of a decree or order of a Court or otherwise. Recourse can be had only under the provisions of the Act. The State is manifestly his lessor. The Act does not expressly exclude the State from the definition of landlord. Nor is the State specifically included in the definition of landlord in the Act. The Act defines 'landlord' in relation to the land held by a cultivating tenant, as 'the person entitled to evict the cultivating tenant from such holding or part'. If there is nothing else to consider, the State could be considered a landlord under the Act. There is no definition of the term " person " in the Act limiting it to natural persons, and it was not argued before me that the State should not be considered as a person . It is manifest that the word 'person' has been employed compendiously to cover all juristic entities that

could evict a tenant. The State can, if the context warrants, be regarded as a person; See *State of Bihar* v. *Sonabati Kumari*[1].

I may immediately take up for consideration the Government Grants Act (Act XV of 1895), an Act stated as intended to explain the Transfer of Property Act, 1882 so far as it related to grants from the Government and to remove certain doubts as to the powers of the Government in relation to such grants. The Preamble to the Act states that, as doubts have arisen as to the extent and operation of the Transfer of Property Act, 1882, and as to the power of the Government to impose limitations and restriction upon grants and other transfers of land made by it or under its authority and it is expedient to remove such doubts, the law was enacted. Of the two principal sections in the Act, section 2 provides that the Transfer of Property Act shall not apply to Government Grants. Section 3, on which reliance is placed, runs as follows.

> "All provisions, restrictions, conditions and limitations ever contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding."

The argument for the State based on section 3 is: The leased deed has provided that the plaintiff shall surrender possession on the expiry of the three year period of lease. It may be that Madras Act (XXV of 1955) grants tenants, in certain circumstances, immunity from eviction and entitles them to continue in possession. By virtue of section 3 of the Government Grants Act, the provisions, restrictions, conditions and limitations of the lease deed ought to prevail over the statutory rights conferred on tenants under Madras Act (XXV of 1955). Though a point can be raised whether section 3 Government Grant Act should not be limited in its scope having regard to the express object of the Legislation, the contention is not only *prima facie* appealing, but is supported by authorities.

In *Murugesa Gramani* v. *Province of Madras*[2], the applicability of the Madras City Tenants Protection Act (Act III of 1922) to a lease of a plot of land by the Government came up for consideration. The lease deed provided for forfeiture and re-entry in certain circumstances. The tenant contended that he could be evicted, if at all, only under the provisions of the City Tenants Protection Act. This Court held that the Crown Grants Act prevailed over the City Tenants Protection Act and the terms of the lease could be enforced. As the lease provided that it should come to an end on the expiry of three years, the lessee was bound by the covenant and had no right to be in possession after the expiry of the lease, notwithstanding the provisions of the Tenants Protection Act. There is also a Division Bench decision of this Court in *Ullattuthodi Chovi* v. *The Secretary of State for India*[3], wherein it was held that, if the terms of a lease granted by the Crown provided for surrender of the demised land by the lessee on six months notice, he could not resist a suit in ejectment by the Crown after the requisite notice, on the ground that he must be paid the value of his improvements under the Malabar Compensation for Tenants' Improvements Act. There is an earlier decision of this Court in *Kallingal Moosa Kutti* v. *The Secretary of State for India*[4], wherein it was held that, under sections 2 and 3 of the Crown Grants Act, the Government had power to impose restrictions in a lease made by it, a power which was not affected by the provisions of the Malabar Compensation for Tenants' Improvements Act. These decisions may not be good law, after the categorical pronouncement of the Judicial Committee about the scope of section 3 of the Crown Grants Act. In *Jagannath Baksh* v. *United Provinces*[5], after setting out the general proposition that the Crown cannot deprive itself of its Legislative authority by the mere fact that in the exercise of its prerogative it makes a grant of land within the territory over which such Legislative authority exists, the Judicial Committee proceeded to consider section 3 of the Crown Grants Act and observed :

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1. (1961) 1 S.C.R. 728 : A.I.R. 1961 S.C. 221.
2. (1946) 2 M.L.J. 171.
3. (1921) 41 M.L.J. 494.
4. (1920) I.L.R. 43 Mad. 65 : 37 M.L.J. 332.
5. (1946) 2 M.L.J. 29 : (1946) F.C.R. 111 : L.R. 73 I.A. 123 : 1946 F.L.J. 88 : A.I.R. 1946 P.C. 127 at 131.

"These general words cannot be read in their apparent generality. The whole Act was intended to settle doubts which had arisen as to the effect of the Transfer of Property Act, 1882, and must be read with reference to the general context and could not be construed to extend to the relations between a *sanad* holder and his tenants. Still less could they be construed to limit the statutory competence of the Provincial Legislature under the Constitution Act."

We are not concerned in the instant case with any provisions of the Transfer of Property Act. The tenant does not rely on any provisions of the Transfer of Property Act for continuance in possession. He relies upon an independent enactment, Madras Act (XXV of 1955). Section 2 of the Government Grants Act is out of way and the only question is whether section 3 of the Government Grants Act (formerly Crown Grants Act) could be relied upon by the defendants. The decision of the Judicial Committee in *Jagannath Baksh* v. *United Provinces*[1], as to the limited scope of section 3 has been followed by the Supreme Court in *Collector of Bombay* v. *Nusserwanji*[2], and the position now is, therefore, beyond question that section 3 of the Government Grants Act saves a Government grant only in respect of provisions, restrictions, conditions and limitations over, which would be hit by the Transfer of Property Act. The Supreme Court observed:

"Reading the enactment as a whole, the scope of section 3 is that it saves 'provisions, restrictions, conditions, and limitations over' which would be bad under the provisions of the Transfer of Property Act, such as conditions in restraint of alienations or enjoyment repugnant to the nature of the estate, limitations offending the rule against perpetuities and the like. But no question arises here as to the validity of any provisions, restriction, condition or limitation over, contained in Exhibit-A on the ground that it is in contravention of any of the provisions of the Transfer of Property Act and there is accordingly nothing on which section 3 could take effect."

The Government Grants Act thus being unavailable, the State sought to stand on thearchaic preiogative and immunity of "the Crown" from operation of statutes. It was suggested that the State, by virtue of the prerogative right which had been conceded to the Crown, was not bound by any statute, whereby any prerogative right, title or interest belonging to it may be divested or abridged, unless the statute expressly named the State or bound it and property owned by it by clear indication. This plea, again, is not available to the defendants after the decision of the Supreme Court in *State of West Bengal* v. *Corporation of Calcutta*[3], and *Union of India* v. *Jubbi*[4] In *State of West Bengal* v. *Corporation of Calcutta*[5], the Supreme Court considered the correctness of the former decision of the Court in *Director of Rationing and Distribution* v. *Corporation of Calcutta*[6], and disagreeing with the majority view therein, held:

"On the other hand, the normal construction, namely, that the general Act applies to citizens as well as to State unless it expressly or by necessary implication exempts the State from its operation, steers clear of all the said anomalies. It *prima facie* applies to all States and subjects alike, a construction consistent with the philosophy of equality enshirned in our Constitution. The natural approach avoids the archaic and moves with the modern trends. This will not cause any hardship to the State. The State can make an Act, if it chooses, providing for its exemption from its operation. Though the State is not expressly exempted from the operation of an Act, under certain circumstances such an exemption may necessarily be implied. Such an Act, provided it does not infringe fundamental rights, will give the necessary relief to the Sate."

During the course of the discussion, the Supreme Court observed,—

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1. (1946) 2 M L J 29 : (1946) F.C R 111 : L.R.73 : I.A. 123 : 1946 1 F.L J. 88 : (1946) 2 M L.J 29: A I.R. 1946 P C 127.
2. (1955) S C J 339 : (1955) 1 S.C.R. 1311 : A I.R. 1955 S C 298. at 306.
3. (1967) S.C.R. 170 : A.I.R. 1967 S.C. 997 at 1008, 1007 and 1011.
4. (1968) 2 S C J. 197 : A.I.R. 1968 S C. 360. at 362 and 364.
5. (1967) 2 S C.R. 170:A I.R. 1967 S.C. 997. at 1008, 1007and 1011.
6. (1961) An.W.R. (S.C.) 88: 1961 M L J. (Crl) 225: (1961) 1 M.L J. (S C.) 88 : (1961) 1 S.C.J. 406: A.I.R. 1960 (S.C.) 1355.

"We have no Crown : the archaic rule based on the prerogative and perfection of the Crown has no relevance to a democratic republic : it is inconsistent with the rule of law based on the doctrine of equality ;"

In the latest case *Union of India* v. *Jubbi*[1] a citizen applied under section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953, for acquiring proprietary rights in Government lands set out in the application, claiming to be the cultivating tenant of those lands. He stated that he was the tenant of the Union of India in respect of the said lands, and that he was willing to pay compensation as provided by the Act. On the question of the applicability of a statute to the State and its immunity, the Supreme Court re-stated the present position thus :

"The position now therefore is that a statute applied to State as much as it does to a citizen unless it expressly or by necessary implication exempts the State from its operation."

Proceeding the Supreme Court observed :

"It is conceded that neither section 11 nor any other provision in the Act contains any express exemption. Broadly stated, if the Legislature intended to exclude the applicability of the Act to the State it could have easily stated in section 11 itself or by a separate provision that the Act is not to be applied to the Union or to lands held by it. In the absence of such a provision, in a constitutional set up as the one we have in this country, and of which the overriding basis is the broad concept of equality, free from any arbitrary discrimination, the presumption would be that a law of which the avowed object is to free the tenant of landlordism and to ensure to him security of tenure would bind all landlords irrespective of whether such a landlord is an ordinary individual or the Union."

The following remarks of the Supreme Court, when examining the question whether the statute in that case by necessary implication exempted the State, give a clear guidance for the present case also :

"It is clear that the object of the Act was to abolish big landed estates and alleviate the conditions of occupancy tenants by abolishing the proprietary rights of the land-owners in them and vesting such rights in the tenants. That being the paramount object of the Legislature, it is hardly likely that it would make any discrimination between the State and the citizen in the matter of the application of the Act. This is especially so because if such a discrimination were to be brought about through a construction suggested by the State it would result in an anomaly in the sense that whereas occupancy tenants of lands owned by citizens would have the "benefit of such a beneficient legislation" occupancy tenants of lands owned and held by the State would not get such benefit. An intention to bring about such a discrimination against the latter class of tenants cannot be attributed to the Legislature whose avowed object was to do away in the interest of social and economic justice landlordism in the State."

Now the Madras Cultivating Tenants Protection Act under consideration does not specifically exempt lands leased by the State to a tenant from the operation of the Act. It is relevant here to note that the Madras Buildings (Lease and Rent Control) Act, 1960, in section 10, specifically provides that nothing contained in the section shall apply to a tenant whose landlord is the Government. This exemption may be seen even in the earlier Rent Control Enactment of 1949. I can see nothing special in the Act now under consideration to conclude that it exempts the State by necessary implication. The relationship that is postulated for applicability of the Act is that of landlord and tenant. A State can clearly be a landlord and the Madras State is the landlord here. The object of Madras Act (XXV of 1955) is the protection of a cultivating tenant from eviction. The preamble states that it is necessary to protect cultivating tenants in certain areas in the State of Madras from

1. (1955) S.C.J. 339 : A.I.R. 1955 S.C. 298 at 306.

unjust eviction. What is unjust eviction has to be looked for in the Act itself; that eviction would be unjust which is not permitted by the Act. Section 3 of the Act puts an embargo on all evictions except under the provisions of the Act. Any removal of a cultivating tenant from the land, outside the provisions of the Act will be unjust, and what is there relevant in the context to infer that the Legislature intended to discriminate between tenants of Government lands and tenants holding from other landlords?

It is contended for the State that section 4-A of the Act provides for a landlord to resume possession, from any cultivating tenant, half the extent of lands leased, for the purpose of personal cultivation by the landlord, and that, as personal cultivation involves contribution of one's own physical labour or that of the members of his family, an artificial person cannot be a landlord. This argument assumes that that every landlord must be entitled and qualified to resume possession of land for personal cultivation, an assumption not warranted. Section 4-A came in by an amendment of the original Act in 1956. When deeming entities complying with certain legal formalities as persons, law, by analogy to the extent and consistent with the purposes of the creation, takes rules applicable to ordinary persons and extends them to the artificial persons. All the rules that apply to natural persons may not be extended to artificial persons and need not necessarily be extended. There is no logical compulsion to make the analogy complete. The Act has been applied without question to lands owned by juridical persons like deities, charitable institutions and Trusts. The Public Trusts Act (LVII of 1961) does recognise personal cultivation by public trusts and the definition of personal cultivation is the same as in Act (XXV of 1955). In fact, Act (LVII of 1961) recognises the applicability of the Cultivating Tenants Protection Act to Public Trusts. It is unnecessary to consider whether the State cannot have personal cultivation if it should be held to be a necessary qualification for a landlord, and whether the fiction creating a person cannot, in the context, be extended to contribution of physical labour by the accredited limbs of that person, notwithstanding the strict requirement of the definition of personal cultivation. I see no ground for straining to find implied exemption of the State from the provisions of the Act. It is no more a sovereign who has to hug at prerogatives and cling to exemptions. We have a democratic Republic, a service State with the ultimate sovereignty vested in the people. A good part of the functions of the State are non-sovereign in the traditional sense of the word and it functions in those spheres very like a citizen. In the present case the State has granted a lease, and, in the matter of evicting the tenant who is now cultivating the land, for the purpose of inducting another tenant who may be prepared to pay more rent, how is the State different from other landlords like deities, charitable institutions, and so on?

My attention has not been drawn to any provision in the Act other than section 4-A which necessarily warrants exemption of the State from the provisions of the Act. There is nothing in the provisions of the Act suggestive of a distinction between lands held by citizens, Devasthanams, charitable institutions, Trusts and the like and lands held by the State. It is certainly open to the State if it considers necessary in the larger interests of the State to get itself exempted by appropriate amendment of the Statute. As the statute stands, the State can claim no exemption. It follows that the plaintiff is entitled to declaration as prayed for. But the injunction cannot be granted in absolute terms. If the plaintiff could be evicted under the provisions of Madras Act (XXV of 1955), the State can certainly do so.

In the result, the decrees and judgments of the Courts below are set aside and the suit is decreed accordingly. The Second Appeal is allowed with costs. Leave granted.

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE R. SADASIVAM.

The Management of Xavier Contractor, Anaimudi Estate, Mudis Post .. *Petitioner* *

v.

The Presiding Officer, Labour Court, Coimbatore, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *sections* 2 (k) *and* 10—*Industrial dispute—Individual dispute, when would become industrial dispute—Reference under section* 10 *to Labour Court—If can grant relief on a matter not referred to it.*

It is now settled law that an individual dispute, in order to be an industrial dispute within the meaning of section 2 (*k*) of the Act, must have a collective support from a substantial number of workmen in the establishment. Otherwise a Labour Court will have no jurisdiction to entertain the reference and pass an award.

Working Journalists of the 'Hindu' v. *'Hindu'*, (1961) 1 L.L.J. 288 ; *Bombay Union of Journalists* v. *'Hindu', Bombay*, (1962) 2 S.C.J. 107: (1961) 2 L.L.J. 436 ; *Visalakshi Mills* v. *Labour Court, Madurai*, (1962) 2 L.L.J. 93, referred to.

An Industrial Tribunal or Labour Court under the Act should confine its decision to the points which strictly arises on the pleadings between the parties.

Where the reference to the Court under section 10 of the Act was whether the non-employment of a workman is justified, the Court would have no jurisdiction to treat the termination of service of the workman concerned as a retrenchment and award compensation. It will not be open to the Court to ignore the statutory provisions and treat the dismissal, which it holds as improper, as a sort of retrenchment and grant compensation on that basis.

Harinagar Cane Farm v. *State of Bihar*, (1964) 2 S.C.J. 806 : (1963) 1 L.L.J. 692; *Shanmugham* v. *Labour Court*, (1963) 1 L.L.J. 798, referred to.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in I.D. No. 48 of 1965 on the file of the Labour Court, Coimbatore, and to quash its award ,dated 18th May, 1966 published in Supplement to Part II, section 1 of the *Fort St. George Gazette*, dated 8th June, 1966 and printed at pages 5 to 7 thereof.

D. Meenakshisundaram, for Petitioner.

S. Ramaswami, for 2nd Respondent.

The Court made the following

ORDER.—Petition by the Management of Xavier, Contractor, Anaimudi Estate for the issue of a writ of *certiorari* to quash the award of the Labour Court, Coimbatore in I.D. No. 48 of 1965 on its file. The Government of Madras by G.O. Ms. No. 5130, Industries, Labour and Co-operation (Labour), dated 2nd November, 1965 referred for adjudication to the Labour Court, Coimbatore, an alleged industrial dispute between the management of Xavier and its workmen sponsored by the Secretary, Artisan Worker's Union, Valparai. The questions referred to were : Whether the non-employment of Sri V. L. Francis mason by Sri M. R. Xavier, Contractor, Anaimudi estate Mudis Post, is justified if not to what relief he would be entitled and to compute the relief, if any awarded in terms of money if it can be so computed. The Labour Court found that the dispute in the case was an industrial dispute, that V. L. Francis was in the employment of M. R. Xavier, Contractor for 15 years and was not a casual worker as contended by the management and that the termination of the service of V. L. Francis was not justified. But in view of the fact that the

* W.P. No. 2017 of 1966. 5th March, 1969.

Union which took up the cause of V. L. Francis did not prefer any reinstatement but was satisfied with the compensation under section 25-F of the Industrial Disputes Act, the Presiding Officer of the Labour Court held that V. L. Francis was entitled to a sum of Rs. 731.25 being fifteen days wages for every completed year of service.

The learned Advocate for the petitioner urged two contentions before me. The first is that an individual dispute of a workman in order to be an industrial dispute must have a collective support from a substantial number of workmen in the establishment. In support of this contention, he relied on the decisions in *Working Journalists of the 'Hindu' v. 'Hindu'*[1], *Bombay Union of Journalists v. Hindu, Bombay*[2] and *Visalakshi Mills v. Labour Court, Madurai*[3]. The learned Advocate for the 2nd respondent did not dispute the principle enunciated in the above decisions. Even in paragraph 2 of its counter before the Labour Court, the petitioner has stated that the claim of the mason V. L. Francis is not an industrial dispute as defined in section 2 (*k*) of the Act and that no other person under the employment of the management of Xavier the Contractor had supported the cause of the non-employment of V. L. Francis and as such, this dispute must be dismissed *in limine*. V. L. Francis examined himself alone and he has not even spoken to the fact that the other workmen of the management who are substantial in number, supported his claim. In fact there is no evidence to show that the Union, namely, the Artisan Worker's Union who took up the cause of V. L. Francis represented any other workmen of the management. Thus the Labour Court had no jurisdiction to entertain the reference and the award passed is one without jurisdiction.

The second contention urged by the learned Advocate for the petitioner is that the Labour Court acted without jurisdiction in awarding retrenchment compensation when the said question was not referred to it. In *Harinagar Cane Farm v. State of Bihar*[4] the Supreme Court has held that it is desirable that an Industrial Tribunal should confine its decisions to the point which strictly arises on the pleadings between the parties. In *Shanmugham v. Labour Court*[5] it has been held by this Court that where the Labour Court finds that the dismissal of a particular workman is improper and the effect of it would be that such workman should be deemed to have continued in service, it is the duty of the Labour Court to order reinstatement and that it has got no jurisdiction to treat the dismissal as a sort of retrenchment. Retrenchment is governed by the provisions of section 25-F of the Industrial Disputes Act and the termination will amount to retrenchment only if the requisites of that section are satisfied. It is clear from that decision that it is not open to the Labour Court to ignore the statutory provisions and treat the dismissal which it holds to be improper, as a sort of retrenchment and grant compensation on that basis. In fact, the parties did not join issue on the question as to what would have been payable to the workman Francis if it had been a case of retrenchment. If the petitioner had notice of such a claim, it would have put forward appropriate defences against the award of compensation. It was open to the workman Francis to put forward such a claim under section 33 (*c*) (2) of the Industrial Disputes Act.

Learned advocate for the 2nd respondent urges that it is open to this Court in the exercise of its discretion to refuse to interfere with the award if it is satisfied that justice has been done. He relied on the decisions in *Raipur Manufacturing Company Ltd., Ahmedabad v. Nagrashna*[6] and *Howrah Municipality v. Mansa Das Dey*[7] in support of his contention. It should be noted that the Labour Courts in those cases had jurisdiction to make the awards. In the first case, the Supreme Court observed that there appeared to be some force in the contention of the appellant so far as the jurisdiction of the authority was concerned but it did not propose to decide that question of jurisdiction in that case. It further observed that the appeal was

1. (1961) 1 L.L.J. 288.
2. (1962) 2 S.C.J. 107 : (1962) 3 S.C.R. 893 : (1961) 2 L.L.J. 436 at 440.
3. (1962) 2 L.L.J. 93
4. (1964) 2 S.C.R. 458 : (1964) 2 S.C.J. 806 : (1963) 1 L.L.J. 692.
5. (1963) 1 L.L.J. 798.
6. (1959) 2 L.L.J. 837 at 839.
7. (1965) 2 L.L.J. 135.

not directly from the judgment of the authority but was from the order of the High Court dismissing the writ petition, and that whatever infirmities might have attached to the order of the authority, there would be no reason to interfere with the order of the High Court dismissing the writ petition if it came to the conclusion that the order passed by the authority in that case had not resulted in any failure of justice. In the second case *Howrah Municipality* v. *Mansa Das Dey*[1] relied on by the learned Advocate for the 2nd respondent it was held that even assuming that there was no victimisation and that the Industrial Tribunal was erroneous in reopening the findings of domestic enquiry the same did not call for interference in the appeal as it had done substantial justice to the parties. The learned Advocate for the 2nd respondent was not able to refer to any decision that this Court could in disposing of a writ petition under Article 226 of the Constitution of India refuse to interfere with the order passed by the Labour Tribunal if it is one without jurisdiction. I am not also satisfied that the justice of the case requires that the order passed without jurisdiction should be upheld.

For the above reasons, a writ of *certiorari* will issue quashing the award passed by the Labour Court in I.D. No. 48 of 1965 on its file. It is open to the workman to work out his rights, if any, for compensation under appropriate provisions of the Act. The parties will bear their own costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

The Workmen of V. M. Bus Service, represented by the Motor Thozhilalar Sangam by its Secretary, Kulandaivelu, Madras .. *Petitioner* *

v.

The Labour Officer, II, No. 1, D'Sylva Road, Mylapore, Madras-4, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), *section* 12 (1)—*Holding of conciliation proceedings by Conciliation Officer—Discretionary—Cannot be compelled by the issue of a writ of* mandamus.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the first respondent to perform duties prescribed under the Industrial Disputes Act.

A. L. Somayajee for *M/s. Aiyar* and *Dolia*, for Petitioner.

The Court made the following

ORDER.—One Radhakrishnan, a member of the petitioner-Union, was a conductor under the second respondent. He was removed from service on the ground that he had made collections without issuing tickets. He offered some explanation, to which it is not necessary to refer. The Union approached the first respondent, Labour Officer, for undertaking conciliation proceedings and the first respondent informed the petitioner-Union that, as there was no violation of principles of natural justice, no industrial dispute was apprehended. This has been interpreted by the petitioner-Union as a refusal by the first respondent to discharge his duties and, therefore, a writ of *mandamus* has been prayed for.

Under section 12 (1) of the Industrial Disputes Act,

" where an industrial dispute exists or is apprehended, the Conciliation Officer may, or where the dispute relates to a public utility service and a notice under section 22 has been given shall, hold conciliation proceedings in the prescribed man-

1. (1965) 2 L L J. 135.

* W. P. No. 2391 of 1966 — 6th March, 1969.

ner" Notice under section 22 not having been given, there is no obligation cast on the Labour Officer to undertake conciliation proceedings. In addition, he has said that no industrial dispute is apprehended. The statute confers a discretion on the Conciliation Officer to decide whether he should hold conciliation proceedings or not However, sub-section (4) of that section is relied upon on behalf of the petitioner-Union to urge that the Conciliation Officer has got to send a report to the Government setting forth the steps taken by him for ascertaining the facts and circumstances relating to the dispute and for bringing about a settlement thereof, together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at and therefore there is an obligation cast on him to hold conciliation proceedings. This sub-section will apply only where the conciliation proceedings are held and no such settlement is arrived at. It cannot apply where the conciliation proceedings have not been held. To such a case, only sub-section (1) of section 12 applies. As that sub-section confers a discretion on the Conciliation Officer to decide whether he shall hold conciliation proceedings or not, there is no room for the issue of a writ of *mandamus* in this case.

The petition is dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P.S. KAILASAM.

Thayammal .. *Appellant**

v.

Muthuswami Gounder and others .. *Respondents.*

Hindu Law—Maintenance—Widow's claim for, from joint family property—Determination of quantum—Criteria.

Generally stated, the maintenance to be awarded to a widow should be such as would enable her to live consistently with her position as a widow with the same degree of comfort as she had in her husband's house. The fact that the past mode of life of the widow has been demonstrably on a penurious and miserly scale or on the other hand, on a quite extravagant scale would not be helpful to decide the quantum of maintenance payable to the widow. The maintenance that is to be awarded should be determined taking into account the value of the estate, position and status of the deceased husband and of the widow and the reasonable wants of the widow.

While it may be conceded that the status of a Hindu widow has undergone a great change and she is given a much higher status now after the several enactments providing her with a right to property and the change should be recognised in fixing the quantum of maintenance, it cannot be accepted that in all cases, the entire income of the husband should be given as maintenance for what the widow is entitled to is maintenance and not the extra income of the deceased husband.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore dated 31st January, 1962 in Original Suit No. 186 of 1960 (O.P. No. 175 of 1960) (Pauper).

S. Gopalaratnam and *S. Palaniswamy*, for Appellant.

M. S. Venkatarama Iyer, K. Sarvabhauman and *T. R. Mani*, for Respondents.

The Judgment of the Court was delivered by

Kailasam, J.—This appeal is preferred *in forma pauperis* by the plaintiff in the suit for past and future maintenance against the judgment of the Subordinate Judge, Coimbatore.

* Appeal No. 206 of 1963 (pauper) 26th March, 1969.

The plaintiff filed the suit claiming a sum of Rs. 72,000 by way of arrears of maintenance upto the date of suit, and sum of Rs. 24,000 per annum by way of future maintenance and for a charge over the suit properties for payment of arrears and future maintenance. The plaintiff is the widow of Ramaswami Gounder. Defendants 1 and 2 are the brothers of the plaintiff's husband. Defendants 3 and 4 are the sons of the second defendant and defendants 5 to 7 are the sons of the third defendant. Pending appeal in this Court, the third defendant died and his legal representatives were brought on record. Defendants 1 and 2 and the plaintiff's husband were members of the Hindu joint family. Plaintiff's husband died about twelve years before suit without any issues. The family owned about 370 acres of land in Kerala State and about 130 acres in Pollachi Taluk. According to the plaintiff till about 1952, she lived along with defendants 1 and 2 when due to certain misunderstandings between her and defendants 1 and 2, she was driven out from the joint family house. According to the plaintiff the reason for being driven out is that her mother filed a suit for maintenance against the sister's husband of defendants 1 and 2, and she could not induce her mother to come to terms as per the wish of defendants 1 and 2, and as she herself wanted to adopt a son to her husband and asked the consent of defendants 1 and 2. She further stated that she waited till the suit filed by her mother was disposed of, and in December, 1959, she gave notice claiming maintenance. The defendants resisted the suit and pleaded that till the end of November, 1959, the plaintiff was being maintained by the defendants. As amongst the defendants there was a partition of the Kerala properties on 9th October, 1954, and in November, 1959, it was stated that there was a family arrangement by which with the consent of the plaintiff, the Madras State properties were also divided making suitable provision for the maintenance of the plaintiff. A partition deed and a settlement deed in favour of the plaintiff were executed on 30th November, 1959; but later on the plaintiff declined to register the documents. The defendants pleaded that the family settlement dated 30th November, 1959, made ample provision for her maintenance and therefore she was not entitled to any maintenance, much less maintenance before 1959 upto which year the plaintiff continued to stay in the joint family house. The learned Judge of the Court below found that the plaintiff never gave her consent to the settlement Exhibit B-3 dated 30th November, 1959 executed in her favour and therefore the defendants cannot resist the suit for maintenance on the ground that she had accepted the family arrangement. After considering the evidence of defendants 1 to 4 to the effect that the plaintiff gave her consent to Exhibit B-3, the learned Judge observed that if the plaintiff had really given her consent, her consent in the writing would have been obtained. Exhibit B-2 the partition deed of the same date was also not attested by the plaintiff. The plea that after consenting to the terms of Exhibit B-3, she declined to present it before the Registrar, for registration was rejected by the Court below. On the evidence adduced on behalf of the plaintiff, the lower Court came to the conclusion that there is no satisfactory evidence to show that the plaintiff gave her consent to Exhibit B-3. This finding was not seriously challenged before us. As the plaintiff was not even an attesting witness in Exhibit B-3 and as the consent is stated to have been obtained on 30th November, 1959, three days before the suit notice was issued by the plaintiff, we are satisfied that the settlement deed Exhibit B-3 was not executed with the consent of the plaintiff we confirm the finding of the Court below that Exhibit B-3 was not executed with the consent of the plaintiff. There can therefore be no doubt that the plaintiff is entitled to maintenance from out of the joint family properties.

The plaintiff has claimed maintenance from 1952. It is stated that she was driven out of the family house in 1952 as she could not induce her mother to compromise a suit filed by her for maintenance against the sister's husband of defendants 1 and 2 on the terms suggested by defendants 1 and 2 and as the plaintiff wanted to adopt a son to her husband. In 1954, the Kerala properties were partitioned as amongst the defendants, and the plaintiff did not protest against such partition without providing maintenance for her. In the plaint it is not alleged that defendants 1 and 2 asked the plaintiff to induce her mother to withdraw the maintenance suit.

This would indicate that the plea that defendants 1 and 2 compelled her to induce her mother to withdraw the suit is an after-thought.

The voters list corrected upto 1960 in respect of both the villages of defendants 1 and 2 and that of that plaintiff contain the name of the plaintiff in both the villages. We do not think much importance can be attached to these entries. All that it would indicate is that the plaintiff would have lived in both the villages concerned at the time of enumeration. If the plaintiff had been driven out of the joint family house in 1952 she would not have kept quite till about 1959. On the other hand, the evidence indicates that when the partition deed was executed as amongst the defendants, she was not satisfied as no provision for her maintenance was made and hence gave the suit notice Exhibit A-1. The oral evidence of the witnesses examined in both sides is highly interested and discrepant and cannot be relied on in determining the question as to whether the plaintiff was driven out of her house in 1952. Taking into account the circumstances mentioned above, we are in agreement with the finding of the Court below that the case of the plaintiff that she was driven out of the family house in 1952 has not been satisfactorily proved and therefore she will be entitled to maintenance only from the date of Exhibit A-1 3rd December, 1959.

The question that remains to be considered is the quantum of maintenance to which the plaintiff would be entitled to. The evidence let in by both the sides regarding the income from the properties is grossly exaggerated and therefore the question will have to be determined on the evidence of independent witnesses and the documents on record. D.W. 4 is the first defendant. He states that the family owned 363 acres in Kerala and that they sold about 20 acres and owned 343 acres. Out of the 343 acres 22 acres are ayan nanja with two crops. In addition to that, there was also converted wet lands, and about 25 acres are under wet cultivation. In Pollachi taluk, Madras State, the family owns about 130 acres. In Marchinaickenpalayam, the family owns 13 vallams. There ware two wells in it with motors and only five vallams are irrigated and the eight vallams are dry lands. In Rasichettipalayam, the family owns two vallams of thottam and six vallams of dry lands. There are two wells in it with oil engine. There are about 120 cocoanut trees in the tope. In Muthur twenty vallams of dry lands are owned by the family.

So far as the income from Kerala lands are concerned, D.W. 4 stated that he would realise about one bandy of paddy per acre. In arriving at the income from the Kerala lands, the learned Subordinate Judge accepted the evidence of P.W. 4 the irrigation inspector, Chittoor Taluk, Kerala State and the Income-tax returns Exhibit B-4 to B-13 and the assessment orders thereon furnished by the defendants. According to P.W. 4, the family owns 343 acres out of which 23 acres are registered nanja lands, and in about five acres nanja cultivation is carried on in punja lands. There are five wells with three engines and the wells irrigate forty acres. He stated that there are about 75 cocoanut trees. He further stated that about 70 acres are lying fallow. The witness added that one acre of nanja, if leased out, would fetch one bandy of paddy as rent. Each bandy would contain 70 paras of paddy valued at Rs. 3 per para. The witness further admitted that the defendants are paying Agricultural Income-tax. Exhibits B-4 to B-13 would show that the net income from the Kerala lands would be about Rs. 20,000 per annum. The learned Judge accepted the correctness of the assessment orders and fixed the income from Kerala lands at Rs. 20,000 per annum. We see no reason for not accepting the finding of the learned Subordinate Judge. The plaintiff has not adduced any satisfactory evidence for not accepting the income-tax returns filed by the defendants. We therefore confirm the finding of the lower Court that the net income from the Kerala lands would be Rs. 20,000 per annum, net.

Regarding the lands in Pollachi Taluk, the assessment orders relating to Muthur lands only have been filed as Exhibit B-15 and B-16. D.W. 4 admitted in cross-examination that Exhibit B-15 and B-16 relate to Muthur lands only. The learned Judge has estimated that the net income would be roughly about Rs. 10,000. It is not clear as to whether the assessment orders which the learned Judge took into

account refer to other lands in Pollachi Taluk. The learned Counsel for the plaintiff submitted that even if the evidence of the fourth defendant is accepted, the income from Pollachi lands would be at least Rs. 25,000. The fourth defendant has admitted in his cross-examination that the groundnut yield will be thirty bags per vallam, that is four acres. He also admitted that the price at which groundnut is being sold is Rs. 13 to Rs. 15 per bag. Calculating at this rate, the groundnut produce from Marchinaickenpalayam, Rasichettipalayam and Muthur lands which are seven vallams of thottam lands and 34 vallams of dry lands, would be about 1,860 bags, fetching a price of Rs. 25,000. But the witness in the latter part of his cross-examination corrected himself and stated that the net income will be 17 to 18 bags of groundnut per vallam in Muthur lands and in the other lands also the income will be more or less the same. He stated that the yield would be forty bags per vallam in Thottam. The learned Counsel submitted that the admission made by the fourth defendant must be accepted and the income should be taken at least as Rs. 25,000 per year. We feel that this estimate may be on the high side and it would be safe to fix the net income from the Pollachi Taluk properties at Rs. 16,000 per annum. We are therefore satisfied that the family is possessed of properties which are fetching a net income of Rs. 36,000 per annum.

The question arises as to the amount of maintenance to which the plaintiff would be entitled to. On behalf of the plaintiff Mr. Mohan Kumaramangalam, the learned Counsel submitted that taking into account the status that is given to a widow in modern times and the recognition of her right to property by various enactments though she would not be entitled to a share in the immovable property as her husband died before the various enactments conferring property rights on the widow came into force, she would at least be given the share of the income which her husband would have got. On the other hand, it is contended on behalf of the defendants that what she is entitled to is that much of an amount which would satisfy her reasonable wants including not only the ordinary expenses of living, but what she might reasonably expend for religious and other duties incident to her station in life. It was pointed out that the widow is living in an extremely frugal manner being, satisfied with seven white sarees a year and therefore a maintenance of Rs. 1,500 a year would be ample to meet her requirements.

The method of determination of quantum of maintenance under the Hindu Adoptions and Maintenance Act, 1956, is provided in section 23 of the Act. The various circumstances that are to be taken into account in determining the amount of maintenance are stated in section 23 (2) and (3) of the Act. But in this case as the death of the husband of the plaintiff was before the Act came into force, the law as it stood prior to the Act governs. Generally stated, the maintenance to be awarded to a widow should be such that would enable her to live consistently with position as a widow, with the same degree of comfort as she had in her husband's house. The position and status of the deceased husband and of the widow and the reasonable wants of the widow should all be taken into account. In *Mt. Ekradeshwari* v. *Homeshwar*[1], the Privy Council observed that the quantum of maintenance would depend upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the condition and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being of course had to the scale and mode of living, and to the age, habits, wants, and class of life of the parties. In short, their Lordships observed that it is out of a great category of circumstances, small in themselves, that a safe and reasonable induction is to be made by a Court of law in arriving at a fixed sum. Their Lordships also proceeded to observe that there may be circumstances in which the past mode of life of the widow has been demonstrably on a penurious and miserly scale, or on the other hand, on a quite extravagant scale having regard to the total income of the husband, and that in such a case the scale was suited to his own position in life, that is a sound point from which to start the esti-

1. L.R. 56 I.A. 182 : 57 M.L.J. 50 : A.I.R. 1929 P.C. 128.

mate. It is unnecessary to refer to the figures relating to the income of the family and also the members in the case before the Privy Council. It is clear that the fact that the past mode of life of the widow has been demonstrably on a penurious and miserly scale or on the other hand, on a quite extravagant scale would not be helpful to decide the quantum of maintenance payable to the widow. In *Audemma* v. *Varada Reddi*,[1] a Bench of this Court on a consideration of the case-law on the subject held that the widow's claim for maintenance out of the joint family property is absolute in the sense of not being liable to be reduced because of the possession of any property by her in her own right as stridhanam, and that she would be entitled to an amount necessary and sufficient for maintaining herself in the manner in which she was maintained by her husband. In *Nagendramma* v. *Ramakotayya*[2], a Bench of this Court after referring to the various decisions held that the Privy Council case *Mt. Ekradeshwari* v. *Homeshwar*[3], should be followed. The learned Counsel referred to the decisions of other High Courts, namely, *M. Satyanarayanamurthi* v. *M. Jagamma*[4], and *Kiran Bala* v. *Bankim Chandra*[5]. The decisions in those cases were rendered on the particular facts of those cases and are not helpful in deciding the quantum of maintenance in this case. On a consideration of the case law, we are satisfied that the maintenance that is to be awarded should be determined taking into account the value of the estate, position and status of the deceased husband and of the widow and the reasonable wants of the widow. We are not able to accept the contention of the learned Counsel for the defendants that as the widow was living in an extremely frugal manner a small sum of maintenance would suffice, for, such a plea was not accepted by the Privy Council *Mt. Ekradeshwari* v. *Homeshwar*[3]. To accept such a contention would result in victimising widows leading frugal lives and rewarding those spending extravagantly.

Mr. Mohan Kumaramangalam on behalf of the plaintiff widow submitted that the Court will have to take into account the changed status of the widow in the modern society brought about by the several enactments and change in social outlook and therefore in providing for the reasonable wants of the widow, the income to which the husband would be entitled to should be awarded as maintenance. While we accept the contention that the status of a Hindu widow has undergone a great change and she is given a much higher status now after the several enactments providing her with a right to property and the change should be recognised in fixing the quantum of maintenance we are unable to accept the contention that in all cases, the entire income of the husband should be given as maintenance for what the widow is entitled to is maintenance and not the extra income of the deceased husband. It may be that if the income of the deceased husband is limited and would be required to maintain the widow in reasonable comforts the entire amount may be given as maintenance. In the present case, it may be pointed out that there is no evidence on the side of the plaintiff widow as to what her requirements are to provide her reasonable comforts in life. In the absence of any such material, we are unable to agree with the contention that the entire share of income of her husband should be given to her as maintenance. We have found already that the income to the share of the plaintiff's husband would be Rs. 12,000 per annum or Rs. 1,000 per month. As it is not possible for the widow to live in the family house, she may have to find an accommodation either in the village or in the nearest town. To have all reasonable comforts consistent with the status of her husband, after a careful consideration, we are of opinion that an inclusive sum of Rs. 500 per month would be the proper amount of maintenance. We therefore fix the amount of maintenance at Rs. 500 (five hundred) per month. The plaintiff would be entitled to the maintenance from 3rd December, 1959. She would be entitled to costs on the amounts decreed. She will pay the Court fee. There will be a charge on the joint family properties for payment of past and future maintenance.

V.K. — *Order Accordingly.*

1. (1948) 2 M.L.J. 30 : I.L.R. (1948) Mad. 803.
2. (1955) 1 M.L.J. 25.
3. L.R. 56 I.A. 182 : 57 M.L.J. 50 : A.I.R. 1929 P.C. 128.
4. A.I.R. 1962 A.P. 439.
5. A.I.R. 1967 Cal. 603.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Marimuthammal .. *Petitioner**

v.

The State of Madras represented by the Secretary, Home Department, *Fort St. George, Madras*-9 and another .. *Respondents.*

Land Acquisition Act (I of 1894), *sections* 5-*A and* 17—*Emergency provisions under the Act—When can be invoked.*

The urgency provisions in the Act should not be made a cloak for the tardy actions of the authorities and as a cover for their laziness. A mere mechanical repetition that the provision for house sites for Harijans is urgent, as they are living in a congested quarter, should never be allowed as an excuse for dispensing with the enquiry under section 5-A of the Act which would take only a month or two.

(With reference to the facts the Court observed :

"This is a case where the petitioner should have her costs......This sort of lackadaisical procedure followed by resort to emergency provisions should never be tolerated and the persons responsible must be taught a lesson.")

Petition under article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent in G.O. R. No. 2819, Home and quash the section 4 (1) notification and section 6 declaration dated 8th June, 1966 and all subsequent proceedings in pursuance thereof.

J. Kanakaraj, for Petitioner.

R. Krishnamurthy, for the Government Pleader, for Respondents.

The Court made the following

ORDER.—The petitioner is the owner of survey No. 161/2 of an extent of 6-20 acres in Manathal Village, Omalur Taluk, Salem District. A notification under section 4 (1) of the Land Acquisition Act with regard to this land was published in the Fort St. George Gazette dated 22nd June, 1966 and after dispensing with the enquiry under section 5-A by the same notification a declaration under section 6 was also published in *Fort St. George Gazette* on the same day. This writ petition is filed to quash those proceedings.

In reply it is stated that possession of the land has been taken on 3rd February, 1967, though the order of stay in this case was passed only on 8th February, 1967. The main attack of the petitioner in this case is with regard to the use of the emergency provisions of the Land Acquisition Act and dispensing with the enquiry under section 5-A. I consider that there is considerable justification for this attack. From page one of the note file of the Collector produced in response to the *rule nisi* issued in this case it is seen that the question of acquiring the land for Harijans has been pending from the year 1959 and that papers were pending with the Revenue Inspector for a very long time. On 18th April, 1963, the Collector asked him to expedite the matters. Even so, three years passed before the notification under section 4 (1) was published. The authorities, who slept over it for four years in the first instance and for another three years even after their attention had been drawn, cannot certainly be allowed to put forward the excuse that the urgency provision was invoked because it was feared that there may be an outbreak of epidemic in that locality. It should not be made a cloak for the tardy actions of the authorities and as a cover for their laziness. A mere mechanical repetition that the provision for house sites for Harijans is urgent, as they are living in a congested quarter,

* W.P. No. 289 of 1967. 10th April, 1969.

should never be allowed as an excuse for dispensing with the enquiry under section 5-A of the Act which would take only a month or two. I am not satisfied that in this case there was any emergency justifying the resort to the emergency provision.

The writ petition is allowed and that part of notification which in exercise of the powers under section 17 dispensed with the enquiry under section 5-A is quashed, as also the declaration under section 6. The notification under section 4 (1) itself will stand. It is open to the authorities to hold fresh enquiry and proceed further with the matter. I consider that this is a case where the petitioner should have her costs from the respondent. This sort of lackadaisical procedure followed by resort to emergency provisions should never be tolerated and the persons responsible must be taught a lesson. The respondent will pay the costs of the petitioner. Advocate's fee Rs. 100.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Baluswamy .. *Accused.**

Penal Code (XLV of 1860), *sections* 279, 338 *and* 71—*Respective scope of sections* 279 *and* 338—*Conviction under section* 338—*Sentence under section* 279—*No illegality.*

Case referred for the orders of the High Court under section 438 of the Criminal Procedure Code, 1898, by the District Magistrate (J) Ramanathapuram at Devakottai in his letter R.O.C. A. No. 438 of 1968, dated 12th November, 1968 regarding C.C. No. 4309 of 1968 on the file of the Court of the Sub-Magistrate, Srivilliputtur.

Calvin Jacob, for Public Prosecutor for State.

The Court made the following

ORDER.—This is a reference by the District Magistrate, Ramanathapuram, under section 438, Criminal Procedure Code, for setting aside the conviction and sentence imposed under section 279, Indian Penal Code, by the Sub-Magistrate, Srivilliputhur, in C.C. No. 4309 of 1968, on the ground that the sentence under section 279, Indian Penal Code, cannot be sustained by virtue of section 71, Indian Penal Code, as the accused has been convicted under section 338, Indian Penal Code.

This reference is quite unwarranted. Section 279 and section 338, Indian Penal Code, deal with separate and distinct offences. The gravamen of the charge under section 279, Indian Penal Code, is rash and negligent driving on a *Public way,* whereas the gravamen of the charge under section 338, Indian Penal Code, is causing grievous hurt by rash and negligent driving in any place. Therefore, a person can be convicted for causing grievous hurt by rash and negligent driving and punished under section 338, Indian Penal Code, and at the same time for rash and negilgent driving on a public place, he can also be separately punished under section 279, Indian Penal Code. There is no illegality in the conviction and sentence passed by the Magistrate.

This reference is rejected.

V.K. *Reference rejected.*

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* Crl. R C. 1435 of 1968.
Case. Ref. No. 20 of 1968. 25th June, 1969.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P. S. KAILASAM.

Samiappan .. *Prisoner**
(*Accused* 3).

Penal Code (XLV of 1860), section 302—Death by strangulation—Identification of the deceased woman by the saree and the blouse she wore, if proper—Medical examination—Failure to establish the possibility of identification and the cause of death—Conviction, if sustainable.

In view of the complete failure of the medical examination to establish the possibility of identification of the murdered woman, the cause of her death and also the doubtful features of the identification by the saree and blouse she wore, it will not be proper to hold beyond reasonable doubt that it was the body of Rasammal that was unearthed behind the railway line and that Rasammal met with her death by strangulation, relying for the purpose solely on the retracted judicial confession of accused 3 and the non-judicial confession of accused 2, which has got infirmative features. 'Therefore the conviction of accused 3 either under section 302, Indian Penal Code, or under section 201, Indian Penal Code' cannot be upheld. Accused 3 is entitled to the benefit of doubt.

Regarding the part of accused 1 in abducting the deceased woman, in the absence of satisfactory proof of murder, it will not be safe to convict accused 1 of the offence of abduction of the deceased woman with a view to murder her, under section 364, Indian Penal Code. What remains against her is only suspicious evidence regarding her evasive replies to people who questioned her about her movements with the deceased.

R.T. No. 55 *of* 1968.—Trial referred by the Sessions Judge of the Court of Session of the Tiruchirappalli Division at Tiruchirappalli for confirmation of the sentence of death passed upon the said prisoner in case No. 107 of the Calendar for 1968 on the 19th day of August, 1968.

C.A. Nos. 650 *and* 657 *of* 1968.—Appeal No. 650 of 1968 by the prisoner (Accused No. 1) against the sentence of Rigorous imprisonment for three years under section 364, Indian Penal Code, in the said case and C.A. No. 657 of 1968—Appeal by the prisoner (Accused No. 3) against the sentence of death under section 302, Indian Penal Code, read with section 34, Indian Penal Code, and Rigorous imprisonment for two years under section 201, Indian Penal Code, and directed to be merged with the sentence of death passed upon him in the said case.

K. S. Mahalingam, for Appellant.

The Public Prosecutor for State.

The Judgment of the Court was delivered by

Ramakrishnan, J.—There were three accused before the learned Sessions Judge of Tiruchirappalli division in S.C. No. 107 of 1968. Periakkal, accused 1, was charged and convicted of the offence of abduction in order to commit murder under section 364, Indian Penal Code, and sentenced to rigorous imprisonment for three years. Accused 3 Samiappan, brother's son of the first accused, was convicted under section 302 read with section 34, Indian Penal Code, and sentenced to be hanged by neck till he is dead. He was also convicted under section 201, Indian Penal Code, for concealing evidence regarding murder and sentenced to rigorous imprisonment for two years. Accused 2 was acquitted of all the charges. Accused 1 and 3 have appealed against their conviction and sentence. The sentence of death imposed on accused 3 in also before us for confirmation.

The deceased Rasammal was a Harijan woman. She married Raman P.W. 16 about 10 years prior to the occurrence. Rasammal and her husband fell out,

* Referred Trial No. 55 of 1968,
C.A. Nos. 650 and 657 of 1968. 29th April, 1969.

because he refused to get divided from his brother, as desired by her. This quarrel led her to abandon her husband's roof. She returned to the house of her parents Pichaikaran Moopan and Palayee, P.W. 17 and P.W. 18 respectively, in Valandur village. While Rasammal was in Valandur village, she contracted criminal intimacy with P.W. 5 Ramu, the son of the first accused. P.W. 5 was already married. He was living in Kulitalai. He is a Vellala by caste. When the parents of Rasammal insisted on her returning to her husband's house, she decided to elope with P.W. 5 Ramu for the purpose of living in some other place of their choosing. They, first of all, went to the house of Sirumbayee P.W. 12. P.W. 12 is the sister of accused 2. P.W. 12 Sirumbayee and her paramour Ramaswami Nadar P.W. 7 were living in a cocoanut tope near Karur. The day of their visit has been identified by the witness as the day after the *Thai Poosam*, which would correspond to 12th February, 1968. When the caste of Rasammal was discovered as Harijan, P.W. 12 did not like Rasammal's continuing to stay with her. Thereupon, P.W. 5 and Rasammal went to Karur town to live. With some difficulty, they were able to take on rent a small house in Karur from P.W. 11 on a monthly rent which was paid to P.W. 11 by P.W. 5. At Karur, Rasammal purchased certain house-hold-vessels M.O. 8 series from the shop of Mancharan P.W. 15. After having settled down in this manner, P.W. 5 appears to have left for Kulitalai the next day, leaving Rasammal in Karur itself.

During the visit of P.W. 5 and the deceased to the house of Sirumbayee and Ramaswami Nadar and also during their arrangements to obtain a house in Karur, accused 2 Malaikolundu was present with them. Apparently, he did not object to the arrangements which the couple were making for their residence at Karur. But after leaving them, accused 2 appears to have informed accused 1 about what was going on between P.W. 5 and Rasammal. Accused 1 appears to have resented her son eloping with a Harijan woman. She is alleged to have met her daughter P.W. 12 four days after the latter had seen P.W. 5 and the deceased and taken her to task for harbouring the deceased. She is also alleged to have asked P.W. 12 as to why she did not do away with her (Rasammal) and bury her since she was spoiling her son. This conversation was overheared by P.W. 8 Mookan alias Kuppuswami, who warned accused 1 that, if anything untoward happened to Rasammal, he would be the first to disclose it.

Thereafter, accused 1 came to the house of P.W. 11. P.W. 11 has deposed that on the same day Rasammal took leave of her and left her house in the company of accused 1. When questioned, Rasammal told P.W. 11 that accused 1 was her mother-in-law and that she was going to her husaband's place after vacating the house. The next day, P.W. 5 went to the house and when he questioned P.W. 11 about Rasammal, she told him that his mother had taken her away.

The next evidence we have in this case is that of P.W. 2 and P.W. 6, who belong to Pichaigoundanur village in Karur taluk. Accused 3 who is the son of another brother of accused 1, as well as his another brother Rajalingam own a garden. On a certain day, P.W. 2 met accused 1, accused 2 and a woman aged about 25 years in the above-said garden. The woman was wearing at that time a saree and blouse, M.Os. 1 and 2, and ear-rings studded with white stones and also a gold nose-screw, which he identified as M.Os. 3, 4 and 5 series. P.W. 6 also saw in accused 3's garden near Vellagoundanpatti, a woman aged about 25 years along with accused 1. She was wearing at that time the saree M.O. 1, and the blouse M.O. 2. That was the last occasion when anybody else appears to have seen the deceased woman alive. But P.W. 2 and P.W. 6 did not identify the woman who was in accused 1's company in the garden. They identified her only with reference to the saree, blouse and the jewels.

On 16th March, 1968, the village Head-man, P.W. 1, of Pichampatti, on information, noticed flies swarming at a place near the railway line. The earth was dug out and the body of a woman was found buried there. P.W. 1 sent reports to the police and the Magistrate. The Circle Inspector of Police, P.W. 22, on receiv-

ing the report, came to the scene and removed the dead body. Autopsy was conducted on the body by P.W. 20 Dr. John, Assistant Surgeon, Government Hospital, Karur. The doctor noticed that the body was in an extremely advanced stage of decomposition. The orbits were empty and the bones were exposed. There was no fracture of any bone. Uterus was decomposed. The skull was empty. The internal organs had become a semi-solid mass. The doctor could not give any opinion regarding the cause of death, because of the high decomposition of the body. In cross-examination, he said that death could be due to natural causes like heart failure, and consumption of poison, and that the possibility of strangulation also could not be excluded. From the circumstance that the uterus had decomposed, the doctor gave his opinion that death must have taken place more than three weeks earlier to the date of the post-mortem examination. He observed that uterus starts decomposing only after three weeks after death, but it would take three months for the uterus to get completely decomposed. The doctor stated that hyoid bone was absent.

Accused 3 was arrested by the police during investigation. In pursuance of a Statement, the admissible portion of which is Exhibit P-5, Accused 3 took the police and the mediators to his house in Vasukumaranpatti and produced M.Os. 4 to 7 series from a mud-pot inside his house. Accused 3 was then taken before the Sub-Magistrate of Kulitalai, who after administering the usual warnings and giving him more than 24 hours time for reflection, and after satisfying himself that the prisoner was going to give a voluntary statement, recorded the confession statement Exhibit P-11. This is what accused 3 stated in this statement.

"On Friday, my aunt, Periakkal brought a woman with her to the garden. She brought vessels in a bag. An hour later, Malaikolunthan came. The three were talking. Afterwards Malaikolundhan went away. Three days thereafter my aunt told that the woman should be killed, otherwise she will take Raman, her (aunt's) son with her and go away. I refused. She said 'Malaikolundhan is coming. You may also come.' I agreed. After dusk myself and Malaikolundhan went southwards with spade and crowbar. We kept them near the railway line and went to take food. After supper, we carried food for aunt and the woman. They ate. Then we went south to dig pit. After digging the pit we returned to the garden. We laid ourselves near the hay rick and were awake. Periakkal called us. We both called aunt and the woman to come with us to go to Raman and took them towards south. Immediately on climbing the (rail) bund Malaikolundhan caught hold of the neck of the woman and she fell down. Aunt also held her neck. I held her legs. Periakkal and Malaikolund throttled her. She died after half an hour. I removed a thodu and had it with me. I had the nose screw also with me. I kept the vessels in the farm house, the thodu and the nose screw inside the pot. We buried the dead body in the pit and went away. He kept the spade and the crowbar near the hayrick. We three slept in the garden. Malaikolundhan went in the morning. My aunt also left for her place. That was all happened. Then police arrested me."

The learned Sessions Judge found that there was no satisfactory evidence to connect accused 2 with any offence. There was an extrajudicial confession referred to on the evidence of P.W. 9 and P.W. 12 but it was retracted. In his opinion, so far as accused 3 is concerned, the judicial confession of accused 3, though retracted, could be considered as adequately corroborated by the recovery of M.Os. 4 to 8 series from his house. Accused 3 had pleaded that M.Os. 4 to 7 belonged to his brother's wife. But the learned Sessions Judge repelled this explanation as unlikely. He also accepted the evidence of the prosecution witnesses regarding the identification of M.Os. 4 to 7 as the jewels which could have belonged to Rasammal. On these evidence, he convicted accused 3 of murder under section 302 Indian Penal Code as well as under section 201, Indian Penal Code, and sentenced him as mentioned above.

In regard to accused 1, the learned Sessions Judge disbelieved the evidence about her participation in murder. But he took into account the fact that she was seen by P.W. 11 taking the deceased with her from Karur. He also took into account her subsequent statement when questioned about the whereabouts of the deceased. P.W. 5 stated that, when he asked his mother as to where she had taken Rasammal, she had replied that Rasammal had accompanied her up to the bus-stand in Karur and that she thereafter refused to come with her to Kulitalai on the ground that she wanted to go elsewhere. There was also the evidence given by P.W. 7 who had questioned accused 1 about the whereabouts of Rasammal. At first, accused 1 had replied that Rasammal came with her only as far as the bus-stand, and when the witness told her that the relations of Rasammal had come and they were searching for her and that they wanted to give a complaint to the police, accused 1 said that she would pay hush-money if P.W. 7 could silence Rasammal's relations. But accused did not pay the hush-money but told P.W. 7 that she was going to Karur the following Wednesday. Sometime later P.W. 8 had questioned accused 1 about the whereabouts of Rasammal and accused 1 asked him why he was taking such undue interest in the matter. Thereafter, P.W. 17 got a petition, Exhibit P-9 prepared by P.W. 19 and presented it to P.W. 23 the then Sub-Inspector of Police, Kilitalai, who endorsed the petition to the Assistant Sub-Inspector for enquiry and report. The learned Sessions Judge has relied upon the evasive replies of accused 1 as to the whereabouts of the deceased and also her conduct in trying to offer hush-money to P.W. 7 for coming to the conclusion that she abducted the deceased woman with a view to murder her.

We will take up first for consideration the charge against accused 3, for which he was convicted, *viz.*, the offence of murder of Rasammal under section 302 Indian Penal Code. The initial difficulties arise from the identity of the murdered woman, whose body was found in a pit near the railway line and the cause of her death. So far as the identification is concerned, the body has been identified with reference to the garments (saree and blouse), M.Os. 1 and 2. Owing to the advanced stage of decomposition, according to the doctor who conducted the autopsy, no identification by appearance was possible. Even the age of the victim could not be determind. Only the police gave her age in the requisition as 26 years ; but the doctor stated that the age of the woman whose body he examined might be 30 or 35 years. The identification by the saree and the blouse is supported by the statements of the witnesses for the prosecution that when Rasammal was seen in the company of P.W. 5, she was wearing a violet coloured saree with yellow stripes and a white blouse with red spots. That there has been an artificial overstraining on the part of the prosecution on this aspect of the evidence can be inferred from the circumstances that even the witnesses who saw the woman only casually are able to describe, long after the event, the colour, stripes and spots of the saree and the blouse worn by the deceased woman. P.W. 7 Ramaswami Nadar, P.W. 5 Ramu and P.W. 2 Pichaimuthu are all male witnesses, who would not ordinarily make note of the colour or the design of the saree worn by a woman they see casually. But in the testimony of these witnesses, the precise description and particulars of the saree and the blouse of the deceased woman are found. No doubt, women relations like P.W. 18, the mother of the deceased, can be expected to identify her daugheter's clothes. But the fact that other people, who cannot be expected to keep a clear recollection of such particulars, are also prepared to come forward to give an account is a circumstance which taints the prosecution version of the identification of the deceased woman by her saree and blouse with considerable artificiality. P.W. 5 has deposed that the saree M.O. 1 is of a pattern readily available in the market and that he can only say that Rajammal was wearing a saree similar to M.O. 1. These circumstances should make one hesitate before identification of the body as that of Rasammal can be satisfactorily upheld.

As regards the cause of her death, the autopsy provides no help whatever. On the other hand, the doctor's opinion leaves the question open as to whether she died through a variety of causes including poisoning, natural causes or strangulation.

We have, therefore, to fall back upon the retracted confession of accused 3, and the extra judicial confession of accused 2, which has also been withdrawn, for the purpose of identification as well as for determining the cause of death as strangulation. While the principle of proof of *corpus delicti* which has been considered in such cases as the proof that before the accused is found to be the author of the crime, it must be established that the crime charged has been committed-in theft that the property has been stolen, in murder that somebody has been killed the strongest proof of *corpus delicti* in murder is the body of the victim or a vital part of the body by which he could be identified, in the absence of any such evidence, direct evidence may also come from a person who saw the killing or the murderer may confess to the crime. The fact of death should be proved by such circumstances as render the commission of the crime certain and leave no ground for reasonable doubt; the circumstantial evidence should be so cogent and compelling that upon no rational hypothesis other than murder can the facts be accounted for. *Vide* Sarkar on Evidence (Eleventh Edition) page 27. The learned author has referred, in this connection to *Ram Chandra* v. *U.P. State*[1]. We are of the opinion that in the present case, in view of the complete failure of the medical examination to establish the possibility of identification of the murdered woman, the cause of her death and also the doubtful features of the identification by the saree and the blouse she wore, it will not be proper to hold beyond reasonable doubt that it was the body of Rasammal that was unearthed behind the railway line and secondly that Rasammal met with her death by strangulation, relying for the purpose solely on the retracted judicial confession of accused 3 and the non-judicial confession of accused 2, which has got infirmative features as mentioned below.

Regarding the judicial confession itself of accused 3, it has got several infirmative features. Accused 3 is not directly concerned with the deceased in any way. P.W. 5 is his father's sister's son. He was not seen in the company of the deceased at any time by any witness. The evidence is that the deceased, accused 1 and accused 2 were seen together in accused 5's garden. From the point of circumstantial evidence the complete absence of motive and absence of evidence to prove the movements of accused 3 with the deceased at a time immediately proximate to the occurence will normally rule out accused 3's participation in the murder. In the retracted confession, he allots to himself a minor part namely holding of the deceased woman by her legs. The act of strangulation is attributed to accused 1 and accused 2. Accused 1 is an old woman of 55 years of age. It is difficult to believe that she would have taken a prominent part in the strangulation, when two young man accused 2 and 3 were present for the purpose. The confessional statement itself carries with it an air of artificiality, which makes it unsafe to accept it, without material corroboration, both as to the crime and the criminal.

The recovery of the jewels of the deceased woman from the house of accused 3 on the information supplied by accused 3 can be briefly referred to. The jewels themselves have been identified as the jewels worn by the deceased woman. But P.W. 5 states that these jewels M.Os. 4 to 7 do not have any identification marks and that if they are mingled with other jewels of similar type, he would not be able to identify them. They are ordinary jewels worn by women. Accused 3's explanation was that the jewels belonged to his brother's wife. Apart from this circumstance, this is one of those cases where mere possession of the jewels even if they have been found to be those worn by the deceased woman cannot by itself fasten upon the possessor complicity in the murder. It is proper to expect other independent corroboration to prove the connection of the person who possessed the jewels. But such independent corroboration is lacking in this case with the main offence. For the above reasons, we are of the opinion that it is not safe to uphold the conviction of accused 3 either under section 302, Indian Penal Code or under section 201, Indian Penal Code. We give him the benefit of the doubt. The convictions and the sentences on accused 3 are set aside. We acquit him and direct him to be set at liberty.

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1. A.I.R. 1957 S.C 381.

Regarding the part of accused 1 in abducting the deceased woman, in the absence of satisfactory proof of murder, it will not be safe to convict accused 1 of the offence of abduction of the deceased woman with a view to murder her, under section 364, Indian Penal Code. What remains against her is only suspicious evidence regarding her evasive replies to people who questioned her about her movements with the deceased. There is also the evidence of P.W. 7 about her offer to pay hush-money for silencing the relations of the deceased woman. But even on this part of the case, her evidence in the committal Court is different. What she then said was: 'I will give you money. Don't tell anybody else. The woman is not to be found.' P.W. 7 admits that accused 1 never paid him any money. In the above circumstances, it is not safe to convict accused 1 under section 364, Indian Penal Code. We give her the benefit of the doubt, set aside the conviction and sentence, acquit her and direct her to be set at liberty.

The Criminal appeals are allowed.

V.M.K. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M. M. ISMAIL.

Chennichi *Alias* Parikkal, wife of Mariappa Goundar. .. *Petitioner**

v.

D.A. Srinivasan Chettiar S/o. Arunachala Chettiar. .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 115—*Revisional powers of High Court under—Exercise discretionary—Order* (*technically*) *without jurisdiction—Justifiable on merits—Interference if and when can be refused.*

The exercise of the revisional powers of the High Court under section 115, Civil Procedure Code, is purely discretionary. The High Court will not take a technical view and necessarily interfere in every case, where an order is wrong and even improper, if such interference will produce hardship or injustice. The revisional jurisdiction of the Court is intended to secure and subserve and ends of Justice and not to deny or defect it. If interference in a particular case will result in hardship or injustice to a party, the High Court will be justified in refusing to interfere in the exercise of its revisional jurisdiction, even if the order is found to be one without jurisdiction.

On the facts and circumstances of the course of litigation in the instant case the order of the Rent Controller, (confirmed an appeal) though without jurisdiction, is justifiable on merits, and it is not a proper case in which the High Court should interfere as it would result in injustice to the respondent.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Judge, Dharmapuri dated 28th March, 1969 and made in C.M.A. No. 46 of 1968 against the decree of the Court of the District Munsif (Rent Controller) Dharmapuri dated 23rd March, 1968 and made in R.C.O. P. No. 18 of 1967.

K. Sarvabhauman and *T. R. Mani*, for Petitioner.

The Court delivered the following

JUDGMENT.—The tenant is the petitioner in this Civil Revision Petition. He took on lease a piece of vacant land under a Chit dated 26th September, 1957, for a period of three years, for the purpose of putting up a homestead from the respondent herein. The petitioner agreed to have the superstructure removed at the time of the

* C.R.P. No. 1007 of 1969. 27th June, 1969.

termination of the lease and to pay a rent Rs. 9 per month and, in case he committed default, to pay rent at the rate of Rs. 10 per month. The tenant having committed default in payment of the rent accrued due from 26th March, 1964, the respondent laid a suit in ejectment in O.S. No. 277 of 1964 on the file of the Court of the District Munsif, Dharmapuri. The petitioner herein raised various contentions one among which was that the civil Court had no jurisdiction and that, once a vacant parcel of land is taken on lease for the specified purpose of putting up a building and a building has been put up, the land becomes an integral part of the building and the tenant cannot be evicted otherwise than under the provisions of the Madras Buildings (Lease and Rent Control) Act. This contention was based upon two decisions of this Court, *Palaniappa Chettiar* v. *Vairavan Chettiar*[1] and *Palaniappa Chettiar* v. *Sheik Mydeen Sahib*[2]. The trial Court decreed the suit. On appeal, the appellate Court accepted the contention of the petitioner and dismissed the suit, and that decision of the appellate Court has become final.

Thereafter, the respondent filed R.C.O.P. No. 18 of 1967 on the file of the Rent Controller, Dharmapuri. Before the Rent Controller, the petitioner took up the plea that the Rent Controller had no jurisdiction. This contention was advanced in view of the fact that during the interval, the Supreme Court had not affirmed the view taken by this Court in the decisions referred to already and in view of the decision of the Supreme Court a different view was taken by this Court itself in *Kannan* v. *Muthiah Chettiar*[3]. The Rent Controller took the view that the petitioner herein having originally contended that the civil Court had no jurisdiction, it was not open to him to contend that the Rent Controller also had no jurisdiction and only the civil Court had jurisdiction. In this view, he allowed the petition filed by the respondent and ordered eviction of the petitioner herein. Against that order of the Rent Controller, the petitioner preferred C.M.A. No. 46 of 1968 before the appellate Authority, *viz.*, the District Judge, Dharmapuri. The learned District Judge, by his judgment and order dated 28th March, 1969, dismissed the appeal. It is to revise the order in appeal of the appellate authority, *viz.*, the District Judge, Dharmapuri, the present civil revision petition has been filed.

Learned counsel for the petitioner contends that, in view of the subsequent decision of the Supreme Court as well as of this Court, the Rent Controller has no jurisdiction to order eviction and where only a vacant piece of land is taken on lease for the purpose of putting up a building it is only the Civil Court which will have jurisdiction.

Purely from a technical point of view and as a matter of law, certainly the contention of the learned counsel for the petitioner is well-founded. But the only question is, on the facts and circumstances of this case, is there any justification for this Court interfering with the order of the appellate Authority, under section 115 of the Civil Procedure Code?

The exercise of the revisional powers of the High Court under section 115, Civil Procedure Code, is purely discretionary. The High Court will not take a technical view and necessarily interfere in every case, where an order is wrong and even improper, if such interference will produce hardship or injustice. The revisional jurisdiction of the Court is intended to secure and subserve and ends of justice and not to deny or defect it. If interference in a particular case will result in hardship or injustice to a party, the High Court will be justified in refusing to interfere in the exercise of its revisional jurisdiction, even if the order is found to be one without jurisdiction. In this particular case, I have already referred to the fact that, when the respondent moved the civil Court, the petitioner took up the stand that the civil Court had no jurisdiction and, when, subsequently, the respondent moved the Rent Controller, the petitioner took up a reverse stand, though it may be justified on the position of law as it stood then, that the Rent Controller had no jurisdiction and only the civil Court had jurisdiction. In view of this, interference with the order of the

1. (1962) 75 L.W. 21.
2. (1964) 77 L.W. 551.
3. (1968) 2 M.L.J. 631.

Lower Court in this case will render the respondent without any remedy to obtain possession of the land in question, notwithstanding the fact that the petitioner has committed default in the payment of rent and the *bona fide* requirements of the respondent has been admitted. Even if the respondent filed another suit, the petitioner may contend that the same is barred by *res judicata* in view of the previous proceedings instituted in the civil Court, and may prolong the proceedings. Hence, in my opinion this is not a proper case in which the High Court should interfere with the order of the lower Court.

Over and above this, before the appellate Authority, three points were raised for decision. The first point was whether the tenant was guilty of wilful default in the payment of rent. The second point was whether the claim that the appellant (Respondent) required the premises for his own occupation was a *bona fide* one. The third point was with regard to the maintainability of the petition before the Rent Controller. Learned Counsel appearing for the petitioner before the appellate Court gave up the first two points, did not advance any arguments on those points and argued only on the technical point that the Rent Controller had no jurisdiction. I am taking note of this aspect as well, for the purpose of declining to interfere in the exercise of my jurisdiction under section 115 of the Civil Procedure Code with the order of the Rent Controller as well as the appellate Authority, in this case.

Consequently, the civil revision petition fails and is dismissed.

K.G.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE K. N. MUDALIAR.

C. Bhavarlal Managing Proprietor, Sri Meliata Talkies, Ootacamund .. *Appellant**

v.

Mallay Gounder .. *Respondent.*

Madras Cinematograph Rules, rule 13—Constitution of India, (1950), Article 226—Refusal by Collector to renew cinema licence—Interference with under the writ jurisdiction—Scope.

The jurisdiction to grant or refuse renewal of a cinema licence is entrusted to the licensing authority. In exercise of his jurisdiction the licensing authority looks into the matter *prima facie* and for the purpose of his being satisfied that the applicant is in lawful possession of the site. He is not called upon to decide the issue finally between the parties as in a suit. In exercise of the writ jurisdiction the High Court will not take upon itself any investigation as to the legality of possession of the site in the hands of the applicant. All that can be looked into by the High Court is whether the licensing authoity has applied his mind to the documentary evidence prouced before him and weighed it with a view to satisfy himself as to the legality. Short of caprice, arbitrariness or *mala fides* the licensing authority would more than have done his duty if he had gone through that process.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Alagiriswamy dated 15th April, 1969 and made in the exercise of the special Original Jurisdiction of the High Court in Writ Petition No. 3959 of 1968 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the proceedings of the Collector of Nilgiris, Ootacamund dated 15th April, 1968 and made in R.O.C. No. 309/M/68 as confirmed by the Commissioner of Land Revenue and Food Production Madras-5, dated 9th August, 1968, and made in B.P. Rt. No. 3484/L/L-3/1658/68 quash the same.

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* W. A. No. 210 of 1969. 30th June, 1969.

V. Thiagarajan, for Appellant.

S. Seshadri, P. R. Narayana Iyer and Government Pleader for Respondent.

The Order of the Court was made by

Veeraswami, C.J.—The appellant was a lessee of a permanent cinema theatre. The lease was in the first instance, for a term of 10 years, but subject to renewal for a further term of 5 years. After the expiry of 15 years, the appellant applied for renewal of the cinema licence, but without success. The Collector was not satisfied as to his lawful possession of the site on which the permanent theatre was situate. The Board of Revenue declined to interfere. Alagiriswami, J., also considered that no interference was called for and dismissed the appellant's petition under Article 226 of the Constitution.

Mr. Thiagarajan for the appellant attempted to take us through the material which bears on the appellant's lawful possession of the site. But we are of opinion that in a matter like this, this Court exercising writ jurisdiction will not go into the disputed question as to who is in lawful possession. The proceedings under Article 226 of the Constitution are not analogous to a suit. Apart from that, regard must be had to the language of rule 13 of the Madras Cinematograph Rules. The material part of the rule reads : "if he (applicant) is not the owner, he shall to the satisfaction of the licensing authority, produce documentary evidence to show that he is in lawful possession of the site, building and equipment." The jurisdiction to grant or refusal renewal of a licence is entrusted to the licensing authority which is not the Court. The nature of the jurisdiction so entrusted is clearly for the licensing authority to see whether on the documentary evidence produced, he is satisfied that the applicant was in lawful possession of the site. In exercise of his jurisdiction the licensing authority looks into the matter *prima facie* and for the purpose of his being satisfied whether he, the applicant is in lawful possession. He is not called upon to decide the issue finally between the parties as in a suit. This aspect of the matter should be kept in view when it comes up in the form of a writ petition under Article 226 of the Constitution. In exercise of this power this Court will not, in that background, take upon itself to investigate as to the legality of possession of the site in the hands of the applicant. All that can be looked into by this Court, as we are inclined to think, is whether the licensing authority has applied his mind to the documentary evidence produced before him and weighed it with a view to satisfy himself as to the legality. Short of caprice, arbitrariness or *mala fides* the licensing authority would more than have done his duty if he had gone through that process. If this Court is satisfied about it, it will not further go into the rival position in regard to the legality of possession of the site which will not necessarily be the final pronouncement between the parties but leave the issue to be tried as between them in a suit in the appropriate civil Court.

As a matter of fact, we are told that a suit is pending in the Court of the Subordinate Judge at Ootacamund for recovery of possession of the site and theatre. The question, whether the plaintiff in that suit, would be entitled to get possession and whether the defendant, who is the appellant before us, can resist it on the ground that he is lawfully in possession of the site, will have to be gone into in that suit. In this respect if the pleadings require any amendment, of course, it will be for the appellant, who is said to be the defendant in the suit, to take suitable steps to have them amended. If there is an application for appointment of a Receiver and the Court of the Subordinate Judge thinks fit to accept the application, it will obviously be open to the Court to appoint a Receiver who can apply for renewal of the licence, for in that case the Receiver in possession of the site will be regarded as being in possession on behalf of that party which may ultimately be regarded as the rightful party entitled to possession.

Subject to the above observations, we decline to interfere. The appeal is dismissed. No costs.

We are told that because of the stay granted pending appeal, the appellant has been running the theatre and that if all on a sudden he is stopped from running the

theatre, prejudice will ensue. Keeping this in view but without prejudice to the rights of the other party, we direct that the appellant will be permitted to run the theatre for thirty days from to date within which he may move the Court of the Subordinate Judge at Ootacamund for such relief as he may be entitled to. For the period of thirty days, during which we have permitted the appellant to run the theatre, he will maintain proper and accurate accounts of the receipts and outgoings in respect of the running of the cinema theatre every day and file the same in the Court of the Subordinate Judge once a week, preferably by Saturday of every week.

V.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

V.S. Swaminatha Pillai .. *Petitioner**

v.

The Authorised Officer (Land Reforms), Tirunelveli, and others .. *Respondents*

Madras Public Trusts (Regulation and Administration of Agricultural Lands) Act (LVIII of 1961), sections 2 (5) (c) and 2 (14)—Scope—Intermediary not contributing his own physical labour or that of any member of his family in the cultivation of the land, but sub-leasing it to others, if a cultivating tenant.

As the petitioner is not contributing his own physical labour or that of any member of his family in the cultivation of the land belonging to the third respondent, though he may have a tenancy agreement with the third respondent, he is not a cultivating tenant. But the persons who have taken lands on sub-lease from the petitioner and are cultivating them, would be cultivating tenants under sub-clause (c) of section 2 (5) of the Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961. This Act, when it deals with a cultivating tenant, is really dealing with a person who is cultivating the land and not with a person who has merely taken a lease of land and has sub-leased it to others for the purposes of cultivation. There is no provision in the Act which enables any of the authorities concerned to deal with a mere lessee who will be an intermediary under sub-section (14) of section 2.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Authorised Officer (Land Reforms) Tirunelveli dated 29th March, 1966 in poceedings E15/63 as confirmed by the order of the Collector of Kanyakumari District at Nagercoil dated 6th September, 1966 and made in his proceedings G-2. 15290/66 and quash the said orders and made therein.

S. Padmanabhan and *P. S. Madhusudanan*, for Petitioner.

S. T. Ramalingam, for the Government Pleader, for Respondents 1 and 2.

T. R. Ramachandran, and *T. R. Rajagopalan*, for 3rd Respondent.

The Court made the following

ORDER.—Petitioner had taken on lease an extent of 45 acres 48 cents of wet land and 7 acres 22 cents of dry land from the third respondent for a period of 25 years from *Kollam Andu* 1122 corresponding to 1945-46. The Authorised Officer took the view that he was a cultivating tenant under the third respondent—Trust within the meaning of the term under the Madras Public Trusts (Regulation of Administration of Agricultural Lands) Act, 1961. Under the Act a cultivating tenant's ceiling area is five standard acres and any extent in excess reverts to the lessor. The Authorised Officer therefore took the view that the petitioner should surrender lands in excess of five standard acres to the Trust. He ordered notice under Rule 9 (i) of the Madras Public Trusts (Regulation and Administration of Agricultural Lands)

*W P No. 2437 of 1966. 3rd July, 1969.

Rules, 1962 for selecting the excess lands that have to be surrendered by the petitioner. The petitioner took up the position that by section 4 of the Holdings (Stay of Execution Proceedings) Act of 1960, he could not be evicted and that in any case before being evicted he should be paid as compensation the amount which he had spent on improving these lands. The Authorised Officer overruled this contention and held that the provisions of the Madras Public Trusts (Regulation and Administration of Agricultural Lands) Act applied to this case and the petitioner is bound to surrender the excess area to the Trust on the ground that the petitioner was a cultivating tenant. He held that he would be taking proceedings under the other provisions of the Act. The petitioner filed an appeal to the Collector who dismissed his appeal.

Before this Court three contentions were raised by the petitioner : (1) That the Act is unconstitutional ; (2) that he is not a cultivating tenant but an intermediary; and (3) that in any case he is entitled to the benefits of the Travancore Holding (Stay of Execution Proceedings) Act. The first contention is easily dealt with because the Supreme Court has held that all Acts included in the Ninth Schedule to the Constitution are valid and this is one such Act. It is not necessary to deal with the third contention in the view that I am taking of the second contention, that the petitioner is not a cultivating tenant.

According to the petitioner all the lands which he had taken on lease from the third respondent have been sub-leased to various tenants. None of them is in possession of any extent over five acres. This contention of the petitioner is in a way supported by the counter-affidavit filed by the third respondent wherein he says that the various persons who had been let in as tenants by the petitioner have subsequently attorned to him, and that the petitioner is not in possession of any of the lands of which he had taken on lease. Now, the Madras Public Trusts (Regulation and Administration of Agricultural Lands) Act, 1961 defines a cultivating tenant as below:

"Section 2 (5) : 'Cultivating tenant'—(i) means a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied ; and

(ii) includes—

(*a*) any such person who continues in possession of the land after the determination of the tenancy agreement ;

(*b*) the heir of such person, if the heir contributes his own physical labour or that of any member of his family in the cultivation of such land ; or

(*c*) a sub-tenant if he contributes his own physical labour or that of any member of his family in the cultivation of such land ; but (iii) does not include a mere intermediary or his heir."

Clause (14) of that section describes an intermediary as below :

"'Intermediary' means any person who not being an owner or a possessory mortgagee, has an interest in land, and is entitled, by reason of such interest, to possession thereof but has transferred such possession to others."

As admittedly the petitioner is not contributing his own physical labour or that of any member of his family in the cultivation of the land belonging to the third respondent, though he may have a tenancy agreement with the third respondent, he is not a cultivating tenant. But the persons who have taken lands on sub-lease from the petitioner and are cultivating them, would be cultivating tenants under sub-clause (*c*) of section 2 (5). This Act, when it deals with a cultivating tenant, is really dealing with a person who is cultivating the land and not with a person who has merely taken a lease of land and has sub-leased it to others for purposes of cultivation. There is no provision in the Act which enables any of the authorities concerned to deal with a mere lessee who will be an intermediary under sub-section (14) of section 2. The

two authorities below who held otherwise are clearly in the wrong, but they cannot be blamed because the petitioner did not raise this question in that form before them. In a sense the petitioner cannot be said to be a person aggrieved because he is not in possession of any land and no land could be taken possession of from him. The lands will be taken possession of only from his sub-tenants under the Act and they apparently have no grievance because they are said to have attorned to the third respondent. It is unnecessary to consider whether this allegation which is denied by the petitioner is true or not; and, in any case, the consequences that arise from such a situation are beyond the scope of these present proceedings. We are not concerned in these proceedings with the rights which the petitioner may have against his sub-lessees or with the remedies the sub-lessees will have against the petitioner. Suffice to say for the purpose of this writ petition that the basis on which the two authorities below have dealt with the question is clearly wrong. The writ petition is therefore allowed and the order of the Authorised Officer as well as the Collector are set aside; but any remedies which the petitioner may be entitled to will have to be worked out only in a civil Court. There will be no order as to costs, as the petitioner has not taken up the position before the subordinate authorities, which he has taken before this Court.

V.M.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE K. N. MUDALIAR.

M. V. Ramaswami Nadar .. *Petitioner* *

v.

The State of Madras, represented by the Collector of Chingleput and another .. *Respondents.*

Court fee—Refund of—Writ Appeal un-numbered—Dismissed as withdrawn—Party getting relief outside Court—Refund of Court-fee—Provisions of section 70 of Court-fee and suits valuation Act inapplicable—Whether party entitled to.

Held, There is no dispute that section 70 of the Court-fees and Suits Valuation Act has no application, for none of the grounds exists which would bring the case within its scope. In such a case, the course adopted by this Court, in a number of cases is that if it is satisfied *ex debito justitiae*, it would certify that it is a fit and proper case for the Revenue to refund the fee subject to the deduction of the usual spoilation charges. The matter should be looked at, not from the stand point of refund of Court-fee to be directed by this Court. That can only be in a case covered by the statutory provision. Where that provision has no application but still the Court thinks that, in the interest of justice, relief should be given to the parties, it will direct a certificate to issue for refund of the Court-fee subject to deduction of the usual percentage. It should not be lost sight of that the charge of Court-fee is not as a tax but as a fee.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a certificate for applying to the Collector of Madras for the refund of Court-fee paid on the above Memorandum of Writ Appeal S.R. No. 42506 of 1967 sought to be preferred to the High Court under Clause 15 of the Letters Patent against the Judgment and order of His Lordship Mr. Justice Kailasam, dated 27th July, 1967, and made in exercise of the Special Original Jurisdiction in W.P. No. 2058 of 1967, presented to the High Court under Article 226 of the Constitution of India to issue a Writ of *mandamus* directing the respondents not to enforce the order of suspension made by the first respondent in Rc. Pr. 869/967 (C.S.)—S-7, dated 3rd July, 1967 and to permit the petitioner to carry on the business as family card Retailer at Harijan Colony Ward No. 11 Madhavaram and to furnish the petitioner with the nature and

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* C.M.P. No. 16715 of 1967. 7th July, 1969.
W.A.S.R. No. 42506 of 1967.

contents of any representation if any made against him and hold enquiry thereon if the respondents deem fit and proper.

R. S. Venkatachari, for Petitioner.

K. Venkataswamy, for Additional Government Pleader, for Respondents.

The Order of the Court was made by

Veeraswami, C.J.—This matter raises a question of refund of Court-fee. Pending the writ appeal filed by the appellant-petitioner, he got the relief, he wanted outside the Court. At his request, the writ appeal has been dismissed as withdrawn. It had not been even numbered and was in the stamp register stage. The appellant, therefore, applies for refund of Court-fee.

There is no dispute that section 70 of the Court-fees and Suits Valuation Act has no application, for, none of the grounds exists which would bring the case within its scope. In such a case, the course adopted by this Court, in a number of cases, is that if it is so satisfied *ex debito justitiae*, it would certify that it is a fit and proper case for the Revenue to refund the fee subject to the deduction of the usual spoliation charges.

One such case in point is *Srimathi Periathayya* v. *Narasinga Rao*[1]. One of us referred to *Thammaya Naidu* v. *Venkataramanamma*[2] and *Chidambaram Chettiar In re*[3] and summed up the position :

> " It follows, that this Court has a limited power to order refund, in exercise of its inherent power under section 151 of the Code of Civil Procedure, but it does not extend to cases other than the instance mentioned in *Chidambaram Chettiar In re*[3]."

We are of the view that the matter should be looked at, not from the stand point of refund of Court-fee to be directed by this Court. That can only be in a case covered by the statutory provision. Where that provision has no application, but still the Court thinks that, in the interests of justice, relief should be given to the parties it will, as we said, direct a certificate to issue, as has been done in a number of cases, for refund of the Court-fee subject to deduction of the usual percentage. It is on that basis *Srimathi Pariathayya* v. *Narasinga Rao*[1] directed the certificate to issue. Our, attention has been invited to *K. S. Venkataraman & Co. (P.) Ltd.* v. *State of Madras*[4]. That case limited itself to the scope of section 70 of the Act and did not go further to consider, whether, outside section 70, the Court may issue such a certificate. The practice of issuing such certificates by this Court has long come to stay and on the principle of *stare decisis* also we would say that the Court may, in proper cases, issue such a certificate.

In the present case, the writ appeal was but in the stamp register stage. It was not even numbered and was not posted for admission before this Court. It should not be lost sight of that the charge of Court-fee is not as a tax but as a fee, as has been held by a Division Bench of this Court. If this is borne in mind, there will be no difficulty in directing a certificate to issue in this case. There will be a direction for the issue of the usual certificate for the refund of Court-fee subject to the reduction of the normal spoliation charges. The memorandum of writ appeal will be returned to the appellant.

S.V.J. *Order accordingly.*

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1. (1966) 2 M.L.J. 159.
2. (1932) I.L.R. 55 Mad. 641 : 62 M.L.J. 541.
3. (1934) I.L.R. 57 Mad. 1028 : 67 M.L.J. 321.
4. (1966) 2 M.L.J. 238.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

Gunasingam .. *Petitioner* (*Accused No.* 1).*

Penal Code (*XLV of* 1860), *sections* 290 *and* 323—*Accused charged for an offence under section* 290—*If could be convicted for an offence under section* 323.

The essential elements of an offence under section 290 (public nuisance), Indian Penal Code, are fundamentally different from the constituent elements of an offence under section 323 (voluntarily causing hurt) of the Code. Hence where an accused is charged for an offence under section 290, he cannot be convicted under section 323 unless the accused is given notice of the charge under the later section. Otherwise an accused is certainly liable to be misled by the terms of the charge and his conviction will be vitiated.

Govinda Naidu and others, In re, (1959) M.W.N. (Crl.) 85, Referred to. *Shanmugasundara* v. *Sadasivam*, (1969) 1 M.L.J. 610: (1969) M.L.J. (Crl.) 508: A.I.R. 1968 Mad. 60, Distinguished and explained.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Special First Class Magistrate, Kuzhithurai, in Summary Trial Case No. 10 of 1967, dated 15th March, 1967.

N. Sivamani and *V. Narayanasamy*, for Petitioner.

S. Jagadeesan for the Public Prosecutor, for State.

O. K. Sridevi for *M. Padmanabhan*, for P.W. 1.

The Court made the following

ORDER.—The revision petitioner seeks to revise his conviction of an offence under section 323, Indian Penal Code. The Sub-Inspector of Police, Puthukadai, charge-sheeted the petitioner and three others for an offence under section 290, Indian Penal Code. The learned Special First Class Magistrate, Kuzhithurai, questioned the accused under section 242, Criminal Procedure Code, as to whether the accused caused public nuisance on 7th December, 1966, at 1 P.M. on the Enayam Keezhkulam Public Road. The accused pleased that they did not commit any offence. After examining P.Ws. 1 to 4 and considering the prosecution exhibits, the learned Special First class Magistrate, convicted the petitioner (and three others were acquitted in the Court below) for an offence under section 323, Indian Penal Code. From the entire proceedings it emerges clearly that the accused had no notice of the charge for an offence under section 323, Indian Penal Code. They were charged only for an offence under section 290, Indian Penal Code. The essential elements of an offence under section 290, Indian Penal Code, are fundamentally different from the constituent elements of an offence under section 323, Indian Penal Code. I have no doubt in my mind that the accused was certainly misled by the terms of the charge put to him and the ultimate and eventual conviction was for an offence under section 323, Indian Penal Code. This is clearly an illegality which vitiates the conviction of the petitioner. The Counsel for the petitioner cited the ruling in *Govinda Naidu and others*, In re[1] and the ruling in in *Nambi and Ramasubbu*[2] (unreported) in support of this proposition of law for quashing the conviction of the petitioner. Kumari O. K. Sridevi cited the authority in *Shanmugasundara* v. *Sadasivam*[3], for the purpose of showing that the conviction is correct. I find no support for such a position from the ruling cited above. That was a case where the Magistrate took cognizance of an offence triable as a summons case but the records and evidence disclose the offence triable as a warrant case. Certainly the Magistrate, if he was otherwise competent from the standpoint of jurisdiction,

* Crl R C. No. 743 of 1967.
Crl. R P. No. 733 of 1967. 31st July, 1969.

1. (1959) M.W.N. (Crl) 85.
2. C.R.P. No. 733 of 1967.
3. (1969) 1 M L J 610 : (1969) M.L.J. (Crl.) 508 : A.I.R 1968 Mad 60.

was quite right to convert summons case into warrant case because he possesses that power. This case has no bearing on the legal position vitiating the conviction of the petitioner. The conviction of the petitioner is quashed. The revision petition is allowed and the fine if paid will be refunded to him.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

Swayamprakasam *alias* Chidambaranathan .. *Petitioner* *

v.

R. Vijayarangam .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10 (2)—*Scope—Suit for partition—Preliminary decree—Respondent, if could be impleaded as a party to the suit at the stage of the final decree proceedings.*

Order 1, rule 10 (2) of the Civil Procedure Code gives jurisdiction to the Court to order that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added at any stage of the proceedings. The proceedings in a suit for partition cannot come to an end till the final decree is passed and hence an order directing a party to be added under Order 1, rule 10, Civil Procedure Code, may be made in a suit for partition before it is actually terminated by the passing of the final decree.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge (Principal) Tiruchirapalli, dated 17th November, 1967 and made in I.A. No. 404 of 1967 in O.S. No. 40 of 1941.

R. Ramamurti Iyer and *R. Srinivasan*, for Petitioner.

N. Sivamani and *V. Narayanaswami*, for Respondent.

The Court made the following

ORDER.—Petitioner was the plaintiff in a suit for partition, O.S. No. 40 of 1941, on the file of the Subordinate Judge's Court, Tiruchirapalli, filed by his mother Anjalai Ayal as his next friend. His father Raju Padayachi was the first defendant in the suit and one Rathnam Ayal, another wife of the Raju Padayachi, was impleaded as the second defendant in the suit. The other defendants were the alienees from the first defendant. The first defendant remained *ex parte* in the suit. Some of the debts incurred by the first defendant were attacked in the suit and in support of the said plea, it was urged that he was leading an immoral life by keeping a concubine by name Marudambal through whom he had a son and two daughters. The alienations made by the first defendant were held to be not binding on the petitioner herein and he got a preliminary decree for his half share in the suit properties on 15th December, 1942 and the final decree proceedings are pending. One Vijayarangam the son of the said Marudambal, filed I.A. No. 404 of 1967, on the file of the lower Court, under Order 1, Rule 10, Civil Procedure Code, to implead him as the 25th defendant in the suit on the ground that he is entitled to one third share in the suit properties as the legitimate son of the petitioner's father Raju Padayachi. The learned Principal Subordinate Judge allowed the petition. Hence the plaintiff-petitioner has filed this revision petition.

The respondent Vijayarangam filed Exhibits A-1 and A-2 to show that in 1962 and 1963 he has joined in executing sale-deeds along with Raju Padayachi and the petitioner herein and that in these documents to which the petitioner herein was a party, he has been described as the son, of Raju Padayachi. The peti-

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*C.R.P. No. 1724 of 1968. 1st August, 1969.

tioner herein, on the other hand, filed Exhibit B-1 to show that in 1943 he and his father Raju Padayachi alone sold some family properties. The question whether the respondent Vijayarangam is a legitimate son of Raju Padayachi has to be decided in the suit. It is true that as the respondent Vijayarangam was not a party to the suit O.S. No. 40 of 1941, on the file of the lower Court, the decree therein will not bind him and it is open to him to file a separate suit to establish his rights. But the question for consideration in this petition is whether as contended by the learned Advocate for the petitioner, the lower Court has no jurisdiction to impleaded the respondent Vijayarangam as a party to the partition suit after the preliminary decree had been passed in this suit as early as 15th December, 1942.

Sri R. Ramamurthi Iyer, appearing for the petitioner, relied on the decision in *Baman Chandra* v. *Balaram*[1] in support of his contention that a partition suit even if co-sharers are necessary parties, an application for their addition cannot be allowed after the preliminary decree is passed except in certain exceptional circumstances such as, impletion of transferees subsequent to the preliminary decree or death of parties whose rights were carved out in the preliminary decree. The correctness of this decision is questioned by the learned Advocate Sri N. Sivamani appearing for the respondent. The ratio of this decision is that in a preliminary decree certain rights are conclusively determined and unless the preliminary decree of a Court is assailed in appeal, the rights so determined will become final and conclusive and cannot be questioned in the final decree. The decision of the Supreme Gourt in *Venkata Reddy* v. *Pethi Reddy*[2] was relied on in the above decision in support of the said view. It is true by virtue of section 97, Civil Procedure Code,

> "Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

This new section was introduced with the object of giving a finality to the preliminary decree so far as the parties thereto were concerned. It cannot affect the powers of the Court under Order 1, rule 10, Civil Procedure Code, to add parties. In *Venkata Reddy* v. *Pethi Reddy*[2], the Supreme Court had to construe the clause in the proviso to section 28-A of the Provincial Insolvency Act that nothing in the section shall affect any adjudication of the properties of the insolvent by a Court, or Receiver or the Collector acting under section 60 made before the commencement of the Provincial Insolvency (Amendment) Act, 1948, which has been the subject of a final decision by a competent Court. The question for decision in that case whether the preliminary decree for partition obtained by the sons of the insolvent which was affirmed finally in second appeal by this High Court can be regarded as a 'final decision'. A suit for partition was filed by the sons of the insolvent impleading the person who claimed to have purchased their share in the joint family property which had been sold by the Official Receiver in the insolvency proceedings against their father. The Supreme Court held that the sale made by the Official Receiver during the insolvency of the appellants' father was the subject of a final decision by a competent Court inasmuch as that Court decided that the sale was of no avail to the purchaser as the Official Receiver had no power to make that sale and that nothing more was required to be established by the appellants before being entitled to the protection of the first proviso to section 28-A of the Provincial Insolvency Act. Thus the Supreme Court had to consider only the meaning to be given to the expression 'final decision' by a competent Court occurring in the first proviso to section 28-A of the Provincial Insolvency Act in dealing with a preliminary decree in a suit for partition filed by the sons of the insolvent in so far as the parties to the proceedings were concerned.

Order 1, rule 10 (2) Civil Procedure Code, gives jurisdiction to the Court to order that the name of any person who ought to have been joined, or whose presence

1. A.I.R. 1966 Ori. 160.
2. (1963) 2 M.L.J. (S.C.) 126 : (1963) 2 An.W.R (S.C.) 126 : (1963) 2 S. C.J. 577 : A.I.R. 1963 S.C. 992.

before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added at any stage of the proceedings. The proceedings in a suit for partition cannot come to an end till the final decree is passed and hence an order directing a party to be added under Order 1, rule 10, Civil Procedure Code, may be made in a suit for partition before it is actually terminated by the passing of the final decree.

In *Ramaswami Chettiar* v. *Vellayappa Chettiar*[1], third parties were added on their own application after a preliminary decree in a partition suit was passed. It was held in that decision that the fact that there was no issue between the parties to the suit as originally framed on the question raised by the applicants was immaterial. In *Krishna Iyer* v. *Subramania Iyer*[2], it has been held that it is competent to the Court to add a person interested in the equity of redemption as a party to a suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned. It was observed in the decision that the party sought to be added had no opportunity to meet the plaintiff's case in its earlier stages and that it would not be fair to implead him as a party and make him liable to the preliminary decree already passed without giving him an opportunity of meeting it. It was held that it was open to the Court to add a party and allow the prior proceedings to be re-opened so far as he was concerned. The Court after considering all the circumstances of the case thought that the said course was desirable instead of driving the plaintiff to another suit against the party sought to be added. In *Swaminatha Iyer* v. *Alagiriswami Chettiar*[3], it has been held that creditors who have obtained decrees can be made parties in a partition suit filed by the sons of the judgment-debtor before the final decree is passed and after the passing of the preliminary decree. In *Syed Mohiddin* v. *Abdul Rahim*[4], it has been held that a third party can be added as a defendant after a preliminary decree in a partition suit. It is clear from the facts of that case that when the Commissioner appointed in the suit to effect a division of the properties went to take the measurements of the house, objections were raised by third parties who had purchased the house very much earlier. It was held in that decision that in the interests of justice and to avoid multiplicity of suits, it was desirable to implead them as parties to the proceedings, there being no legal bar to the adoption of such procedure.

The learned Advocate for the respondent relied also on two un-reported decisions of this Court. In C.R.P. No. 2044 and 2105 of 1967, Veeraswami, J., as he then was, allowed two sisters to get themselves impleaded in a suit for partition between their brothers with regard to the estate of their mother. But this decision is not relevant to this case as the proceedings in that case had not reached the stage of the preliminary decree. If, however, the sisters were ignorant of the partition suit filed by their brothers till the preliminary decree was passed in it, it would not affect their right to get themselves impleaded under the provisions of Order 1, rule 10, Civil Procedure Code, and agitate their rights in the same suit instead of being driven to a separate suit. In C.R.P. No. 2150 of 1965, Ramaprasada Rao, J., has held that notwithstanding the passing of a preliminary decree in a suit for partition, the Court has inherent power to pass such orders as are necessary in the interests of justice so that the equities arising in the action between the parties *inter se* on the one hand and between the parties and alienees, if any, on the other, can be adjusted in the final decree proceedings. The alienee from one of the parties in the partition suit was added as a party after the preliminary decree in the suit. It was held that though the alienation in his favour was prior to suit and it was not affected by the doctrine of *lis pendens*, there could be no objection to his being added as a party after the preliminary decree.

If the respondent Vijayarangam is the legitimate son of the petitioner's father Raju Padayachi, he is a necessary party who ought to have been added in the suit

1. (1931) 60 M.L.J. 229.
2. (1924) 46 M.L.J. 368.
3. (1955) 68 L.W. 831.
4. (1964) 1 An. W.R. 131: A.I.R. 1964 A.P. 260.

for partition. It is true that even if the lower Court had jurisdiction to implead a third party, it should exercise its discretion under Order 1, rule 10, Civil Procedure Code, judicially. On the materials before me, it could not be said that the lower Court erred in impleading the respondent as a party to the partition suit at the stage of the final decree proceedings. It is clear from what I have already stated that the status of the respondent Vijayarangam as the legitimate son of Raju Padayachi is a matter that has to be decided in the suit.

I see no ground to interfere with the order of the lower Court. The civil revision petition is, therefore, dismissed, but in the circumstances of the case, I make no order as to costs.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

Sanyasi Chettiar .. *Petitioner.**

v.

Harigopalsami Udayar .. *Respondent.*

Civil Procedure Code (V of 1908), sections 151 and 152—Sale certificate—Discrepancy in the survey number, if could be corrected—Inherent jurisdiction of the Court.

The sale certificate conferring an unimpeachable title to the auction-purchaser cannot be lightly whittled down and reduced to nothing if a clerical or an accidental mistake (in the present case discrepancy in the survey number) has crept into it by either the lach of the Court or the lach of the litigant and such mistake can always be corrected in exercise of the inherent jurisdiction of the Court to meet the ends of justice.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Tiruvannamalai, dated 7th February, 1966 and made in R.E.A. No. 1159 of 1965 in O.S. No. 138 of 1948.

N. Sivamani, for Petitioner.

V. Janakiraman, for Respondent.

The Court made the following

ORDER.—The transferee decree-holder auction-purchaser is the petitioner before me. He brought to sale certain properties which were admittedly attached in execution of a money decree and it is not disputed that in the earlier stages when successive proclamations of sale were drawn up, lot No. 1 was described as being comprised in Survey No. 49/3-B. But later at any rate in the proclamation of sale under which the sale fructified, this lot was described as being comprised in Survey No. 49/3-A. But the extent of the property remained the same throughout. The petitioner purchased the property in Court auction, an extent of 1-72 acres of land, said to be comprised within survey No. 49/3-A when it ought to be survey No. 49/3-B. He obtained the sale certificate and at the time he sought for possession and registration of the sale certificate, it was brought to his notice that there was a discrepancy in the survey number. It was this which prompted him to apply to the Court for a correction of the sale certificate under section 152 of the Civil Procedure Code. This was opposed by the judgment-debtor on the ground that what was purchased by him being specific, he cannot now change over and seek amendment of the sale certificate from one survey number to another. This found favour with the learned District Munsif of Thiruvannamalai who was of the view that the petitioner purchased in Court auction only survey Nos. 49/3-A and not 49/3-B. As against this the present revision petition has been filed.

Mr. Sivamani, learned Counsel for the petitioner contends that the Court has inherent powers to cause an amendment of the kind sought for and the Court below erred in not having exercised its jurisdiction. Mr. Janakiraman, learned

*C.R.P. No. 2048 of 1967. 14th August 1969.

Counsel for the respondent, however, would state that in the public interest such an amendment ought not to be carried out as it would be virtually granting a different property to the auction-purchaser when it was not so intended under the sale certificate. In *Pethaperumal Ambalam* v. *Chidambaram Chettiar*[1], this Court has laid down that on the issue of a sale certificate to the purchaser, his title becomes perfected and completed. The question, however, is wheter a mistake which has crept in the sale certificate can be corrected by the Court in exercise of its jurisdiction under section 152 or 151 of the Civil Procedure Code. Generally, mistakes anterior to the suit cannot be corrected under section 151 of the Civil Procedure Code. But in the present case, the mistake is posterior to the filing of the suit and in fact long after it. The sale certificate conferring an unimpeachable title to the auction purchaser cannot be lightly whittled down and reduced to nothing if a clerical or an accidental mistake has crept into it by either the lach of the Court or the lach of the litigant. In the case before me, lot number 1 was correctly described as bearing survey No. 49/3-B and even the respondent ought to have understood that such was its survey number. In fact, after the sale the judgment-debtor never took objection to the sale of survey No. 49/3-A, for it is obvious he should have conceded at any rate subjectively that the subject matter of the auction sale was lot No. 1 being survey No. 49-3-B. One other factor in the instant case is that the proclamation of sale contained four items of which lot No. 4 was comprised in survey No. 49/3-A and which was of an extent of 3-42 acres. The auction purchaser obviously is not taking advantage of this and seeking for delivery of survey No. 49/3-A of an extent of 3-42 acres. On the other hand, he equitably requests that the accidental slip which has occurred in the sale certificate be corrected in exercise of the inherent jurisdiction of the Court. An inherent jurisdiction is always exercised to meet the ends of justice. I think that this is a proper case in which such jurisdiction should be exercised to correct the mistake. The lower Court having failed to exercise such jurisdiction, this civil revision petition having been entertained has to be allowed. Accordingly, the application filed, by the petitioner for amending the sale certificate in the manner prayed for is allowed and the Court below directed to carry out the necessary correction. The Civil Revision Petition is allowed. There will be no order as to costs.

V.M.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE GOKULAKRISHNAN.

The Union of India, represented by the Secretary to Government, Ministry of Food and Agriculture, Central Secretariat, New Delhi .. *Appellant**

v.

M/s. Vijaya Agencies (Cuddappah), Madras .. *Respondent.*

Agreement between the Government and the Contractor—Dispute arising out of the agreement—Regional Director to decide the disputes with finallity—Provision for arbitration regarding all disputes arising out of the agreement—Decision of the Regional Director, if subject to arbitration clause or becomes final.

But for clause 5 (*h*) of the agreement, there can be no doubt whatever that the arbitration clause is comprehensive that it could include the dispute relating

1. I.L.R. (1954) Mad. 1206 : (1954) 1 M.L.J. 585 : (1954) M.W.N. 256.

* O.S.A. No. 16 of 1969. 30th July 1969.

to the alleged failure on the part of the respondent leading to the Union Government incurring demurrage. The words "arising out of or in any way touching or concerning this agreement" are wide enough to comprehend such a dispute. Equally, it is clear that the dispute is squarely within the ambit of clause 5 (*h*), which means, it is open to the Regional Director (Food) to decide the difference between the two parties. But the point is whether such a decision should prevail as final and prevent the operation of the arbitration clause over the dispute. It seems that this very question will in itself be within the ambit of the arbitration clause. For, it arises out of, touches and is concerned with the agreement. Apart from that, clause 17 is so comprehensive, and, any dispute arising out of or concerning the agreement would be referable to arbitration and does not except within its scope any dispute which would be comprehended by clause 5 (*h*). Notwithstanding the finality attaching to the decision of the Regional Director (Food), as between the parties under clause 5 (*h*), that finality, when the two clauses are read together, would be subject to the arbitration clause. This is because clause 17 mentions the whole agreement and clause 5 (*h*) has not been excluded from it.

Appeal under Clause 15, of the Letters Patent against the decree of the Hon'ble Mr. Justice Kunhamed Kutti, dated 11th July, 1966 made in Application No. 405 of 1966 in the exercise of the ordinary original civil jurisdiction of the High Court.

The Standing Counsel for Central Government, for Appellant.

C. Rangaswamy Ayyangar and *V. V. Raghavan*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The dispute has arisen between the appellant, which is the Union Government, and the respondent whether there was failure to carry out the work with a view to avoiding incurring of demurrage on the part of the former. The parties differed on the question whether the dispute is covered by the arbitration clause in the agreement which was for providing transport for goods of the Union from the Madras Port to Avadi. While on the one hand the Union relied on clause 5 (*h*) of the agreement to contend that it intended to preventy any difference arising under that clause from being referred to arbitration, the respondent maintained that even a difference within the ambit of clause 5 (*h*) would be within the purview of clause 17, which provides for arbitration. Kunhamed Kutti, J., held that the arbitration clause applied and directed the Union Government to make a reference of the dispute for arbitration. The appeal arises from that order.

We are of opinion that the order of the learned Judge is correct. Clause 17, in so far as it is relevant for the present purpose, reads :

> "17. *Arbitration* : All disputes and differences arising out of or in any way touching or concerning this agreement whatsoever shall be referred to the sole arbitration of any person appointed by the...."

Clause 5 (*h*) taking only the relevant words, reads :

> "*Liability of contractors for losses, etc., suffered by Government*: The contractors shall be liable for all costs, charges and expenses suffered or incurred by the Government due to..their failure to carry out the work with a view to avoiding incurrence of demurrage....The decision of the Regional Director (Food) regarding such failure of the contractors and their liability for the losses, etc., suffered by Government will be final and binding on the contractors."

For the Union it is said that the effect of clause 5 (*h*) is to make the decision of the Regional Director (Food) final and binding as between the parties and that this meant that there could be no question of further arbitration of the dispute. Otherwise, according to the Union, the word 'final' in clause 5 (*h*) will have no meaning attached to it whatsoever. We are told that the two clauses, 5 (*h*) and 17, should be read together and each given effect to in the light of each other, and, if that were done, finality to the decision of the Regional Director (Food) being the intention

of the parties, it should be kept in view in delimiting the scope of arbitration under clause 17.

We are unable to accept this interpretation of the arbitration clause. But for clause (5) (*h*) there can be no doubt whatover that the arbitration clause is so comprehensive that it could include the dispute relating to the alleged failure on the part of the respondent leading to the Union incurring demurrage. The words " arising out of or in any way touching or concerning this agreement " are wide enough to comprehend such a dispute. Equally, it is clear that the dispute is squarely within the ambit of Clause 5 (*h*), which means, it is open to the Regional Director (Food) to decide the difference between the two parties. But the point is whether such a decision should prevail as final and prevent the operation of the arbitration clause over the dispute. It seems to us that this very question will in itself be within the ambit of the arbitration clause. For, it arises out of, touches and is concerned with the agreement. Apart from that, clause 17 is so comprehensive, and, any dispute arising out of touching or concerning the agreement would be referable to arbitration and does not except within its scope any dispute which would be comprehended by clause 5 (*h*). Notwithstanding the finality attaching to the decision of the Regional Director (Food), as between the parties, under clause 5 (*h*), that finality, when the two clauses are read together, would be subject to the clause of arbitration. This is because clause 17 mentions the whole agreement and clause 5 (*h*) has not been excluded from it. It would, therefore, come to this, that, the two clauses read together, the finality in clause 5 (*h*) would have effect only in the absence of an arbitration and will not have the force of preventing the operation of the arbitration clause over the dispute. If it is intended that any dispute, which is within the purview of clause 5 (*h*), is to be excluded from the operation of clause 17 of the agreement, specific exclusion of such dispute should have been made in clause 17.

For the Union Government our attention has been invited to the following observations from Russell on Arbitration, Seventeenth Edition.

" It might seem, therefore, that if the agreement between the parties is in effect an agreement to prevent disputes from arising and not an agreement as to how they are to be settled, then it is neither an agreement to refer to arbitration nor a submission to arbitration, and it is not within the Act. "

We fail to see how this observation is of any assistance to the Union. If clause (5) (*h*) had remained alone without clause 17, phrased as it is, the observation from Russell would be apposite. But here clause 17 does not save or except the dispute within clause 5 (*h*) and the result is the arbitration clause will have full force in respect of the dispute.

The appeal is dismissed with costs. The appellant will have two months' time from to date to appoint an arbitrator and make the reference of the dispute in question.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE K.N. MUDALIAR.

P.N. Raju Chettiar .. *Appellant**

v.

The State of Tamil Nadu represented by the Secretary, Home Department (Accommodation Controller), and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 29 and 10 (3) (a) (iii)—Sections 29 and 10 are mutually exclusive—Section 10 (3) (a) (iii) when may be resorted to.

It is now well settled that the remedy by way of exemption under section 29 is not a substitute for remedies available to a landlord for eviction under the Act.

*W.A. No. 114 of 1969. 25th June, 1969

If he asks for eviction under the provisions of the Act, there could certainly be no occasion for the State Government to exercise its power under section 29. The two powers are mutually exclusive.

"Carrying on business" within the meaning of section 10 (3) (a) (ii) may consist of a series of setps and even if one step is proved, the requirement of the section would be satisfied. But if there is no step at all whatever and the matter is only in the stage of intention, it is difficult to bring such a case under section 10 (3) (a) (iii). Thus, short of any tangible concrete indication of commencement of a business, mere intention to carry on business will not enable the landlord to resort to section 10 (3) (a) (iii).

Decision in C.R.P. No. 137 of 1955 by Basheer Ahmed Sayeed, J., disapproved.

Appeal under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Alagiriswami, dated 30th January, 1969 and made in C.M.P. No. 1459 of 1969 presented to the High Court to excuse the delay in filing W.P.S.R. No. 5082 of 1969 sought to be presented to the High Court under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in Home Department Notification 11-1-No. 1661 of 1967 in G.O.MS. No. 720 dated 3rd March, 1967 on the file of the Secretary, Home Department (In charge) Accommodation Controller and other connected papers and quash the order of exemption passed therein.

A.K. Srinivasan, for Appellant.

V. Thiyagarajan and *T. Aravamudu Iyengar*, for Respondents.

The Order of the Court was made by

Veeraswami, C.J.—The State Government by an order dated 3rd March, 1967, made under section 29 of the Madras Buildings (Lease and Rent Control) Act, 1960, exempted the portion under tenancy in premises No. 176/2 in Anna Pillai Street, George Town, Madras, from the provisions of section 10. The appellant, who is the tenant filed his objections stating *inter alia* that the respondent landlord was but a *poojari* and was not carrying on a business for which he could *bona fide* require the premises for his occupation. With reference to that the impugned order says :

"The Government are satisfied that the claim of the landlord that he required the shop portion in the occupation of the tenant for starting and running a business of his own is *bona fide*. But the landlord is yet to commence the business."

On that view, the order proceeded on the basis that the landlord had no remedy under the provisions of the Act and exercise of the powers under section 29 was called for. The appellant unsuccessfully pursued the matter before the Government by means of what he called a revision petition which was eventually dismissed on 28th December, 1968. On 24th January, 1969 he moved this Court under Article 226 of the Constitution for quashing the exemption. Alagiriswami J. dismissed it on the ground that it was belated.

We agree with the appellant that the ground on which the writ petition was dismissed cannot be sustained. The appellant was until the end of December, 1968 pursuing and we should think *bona fide* the matter before the State Government. Then when he was unsuccessful he promptly resorted to his Court. We are clearly of opinion that in the circumstances there was no delay and if there was it should have been condoned.

In the circumstances we thought it best that we should ourselves deal with the merits of the appJellant's contention against the validity of the exemption. It is strenuously pressed upon us for the appellant that the respondent landlord had a remedy under the provisions of the Act so that the exemption was without juridiction. It is now well settled that the remedy by way of exemption under section 29 is not a substitute for remedies available to a landlord for eviction under the Act. If he asks for eviction under the provisions of the Act there could certainly be no occasion for

the State Government to exercise its powers under section 29. The two powers are mutually exclusive. To that extent the appellant is right.

But the point is whether any remedy was available to the landlord under section 10. As we mentioned it was urged before the Government as well as before us that the landlord being a *poojari* did not and was not carrying on a business. The finding in the impugned order is also that he was not actually carrying on the business and in fact, he had yet to commence the business. In such circumstances, could the landlord have resorted to the remedies under section 10? Sub-clause (iii) of clause (*a*) of sub-section (3) of that section speaks of :

> "If the landlord or his son is not occupying for purposes of a business which he or his son is carrying on."

At first sight the impression the words give, is that actually carrying on business is a condition. That is how Basheer Ahmed Sayeed, J., read them in C.R.P.No. 137 of 1955. He observed :

> "As a matter of fact it seems to me that the intention is to give this right of eviction only to such of the landlords as are actually carrying on business and who may require their own non-residential building in that connection and not to others who might have had a business or who might think of starting a future business."

If this view is accepted, nothing could be said against the validity of the exemption in question but, subsequently, at least three single Judges of this Court were not prepared to place that literal construction, but, at the same time, they did not go to the full length of saying that, short of any tangible concrete indication of commencement of a business, mere intention to carry on business will enable the landlord to resort to section 10 (3) (*a*) (iii). Ramaswami, J., in Civil Revision Petition No. 1891 of 1956 held that a preparation to do business would suffice to enable the landlord to invoke that provision. Panchapakesa Ayyar, J., in *Nataraja Achari* v. *Balasubramaniam*[1], and Ramachandra Iyer, C.J., in *Ramaswamy Pillai* v. *Karmega Thevar*[2], more or less subscribed to that view.

On a careful consideration of the language employed by the section and particularly the words we have extracted and also the view of the several single Judges, we are of the view that while the literal construction placed by Basheer Ahmed Sayeed, J., does not with due respect, commend itself to us, the other view appears to be reasonable. We think so because "carrying on a business" may consist of a series of steps, and, even if one step it proved, we do not see why the requirement is not satisfied. But, if there is no step at all whatever and the matter is only in the stage of intention, it is difficult to bring such a case within the phraseology of the statute. It follows, therefore, that the State Government was right in proceeding upon the basis that the landlord was yet to commence the business and, therefore he could not have made use of section 10 (3) (*a*) (iii). The exemption order was, therefore, competent and does not suffer from any infirmity.

Counsel for the appellant made an impassioned appeal to us that his client had been in the premises for many years and that he had invested large funds in his business and it would be a great hardship if he was evicted. But that in the particular circumstances of the exemption, may not be relevant. After all, what the tenant is entitled to is a statutory protection subject to the provisions of the statute, and, the Act, in our opinion, should be administered in such a way that it maintains balance between landlords and tenants, and, in cases of hardship it is relieved, wherever it lies. In *Ramaswamy Pillai's case*[2], the exemption was, as we have already mentioned, grounded on the *bona fide* requirement of the landlord. It was suggested for the appellant that the landlord being only a *poojari* there was no *bona fides* in his claim,

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1. (1967) 2 M.L.J. 492. 2. I.L.R. (1964) 1 Mad. 712: (1964) 2 M.L.J. 89.

that he required the premises for carrying on his business. We do not think that we can sit in judgment over the finding in this respect as in an appeal. In exercising the powers under section 29, it was open for the Authority to go into the question of *bona fide*. There is nothing unreasonable or perverse about the finding on the question of *bona fide*.

The appeal is dismissed with costs. Counsel's fee Rs. 100.

V.K. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

RM. AK. P. Kannammal Achi and others .. *Appellants**

v.

A.N. Narayanan Chettiar .. *Respondent.*

Will—Requirements—Nature of proof required—Allegation of undue influence—Burden of proof.

The first requisite for a valid will is, the testator must have known and approved the contents of the will. Whenever a will is prepared under circumstances which give reasonable room for suspicion that it does not express the mind of the testator, it is for those who put forward the will to remove the suspicion. It has also been laid down that when a will is prepared by or on the instructions of a person taking a benefit under, or a person getting substantial interest under the will takes a prominent part in the preparation of the will, it is a circumstance raising suspicion. When the benefit is large, the burden of proving the authenticity of the will, will be heavy. But if the will is to be invalidated notwithstanding the discharge of the burden there must be evidence of the actual exercise of undue influence.

While thus the burden on the propounder of the will is to show that the teastator executed the will in his right mind and with disposing mental capacity, the caveator to succeed and have the will thrown out should establish that the will was executed under undue influence and the evidence in regard to this must be of the exercise of influence either by coercion or by fraud. Mere persuasion and importunity which do not unduly overbear the will of the testator would not be undue influence that would vitiate the will.

While evidence not sufficient for an inference that the testator was not of sound mind, would not be sufficient to prove undue influence, in the reverse, it may not always be so. To a certain extent the discussion may overlap. But the question will have to be examined separately. It is needless to state, that as in the case of proving all other documents so in the case of proving of wills, it would be idle to expect proof with mathematical certainty. But if the judicial mind is not satisfied and is doubtful if the whole truth has come out, when it feels that there must be perjury on one side or the other and on which side the prejury is committed and the competence of the testator is doubtful, it may hold that the will has not been proved. The test to be applied is the usual test of satisfaction of the prudent mind in such matters. No doubt, as the testator is not there to affirm or deny whether he made the dispositions as presented in the will, an element of solemnity is introduced, in the matter. Herein comes the phrase taken from Ecclesiastical Law "satisfaction of the conscience of the Court'. But the very solemnity of the proceedings requires, that the Court should not also lightly strike down a will, fair and rational on its face and proved to have been duly signed by the testator in the presence of attesting witnesses, when apparently in sound disposing state of mind. The fact that it is said "conscience' has to function in the matter should not make the Court hesitant, to probe deeper into the matter for discovering the truth, where necessary. Conscience has to function whether it is finding for or against the will.

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*S.A. No. 916 of 1963. 16th August, 1968.

Case law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in appeal Suit No. 26 of 1962, preferred against the decree of the Court of the District Munsif of Devakottai in O.S. No. 86 of 1961.

K. Gopalachari, for Appellants.

A. Sundaram Iyer, for Respondent.

The Court made the following

ORDER.—The substantial question that arises for consideration in this second appeal is about the genuineness and validity of the testamentary document Exhibit A-20 dated 11th October, 1960, put forward as the last will and testament of one Kuppan Chettiar who died on 14th October, 1960.

The plaintiffs have filed the suit as executors appointed under the said will for rendition of accounts by the defendants of his agency of the deceased Kuppan Chettiar's firm in Ipoh. The 1st plaintiff is the wife and the 2nd a daughter of Kuppan Chettiar and the third plaintiff is a stranger to the family. The defendant is the brother of the deceased. He questioned the capacity of the plaintiffs to institute the suit, challenging the genuineness of the will. He set up another will executed by the deceased on 13th March, 1959 at Ipoh, a copy of which is Exhibit B 5. The learned District Munsif of Devakottai accepted the genuineness and validity of Exhibit A-20 and decreed the suit for accounts for the period 27th May, 1952 to 14th October, 1960, the date of the death of Kuppan Chettiar. On appeal by the defendant, the learned Subordinate Judge of Devakottai, while withholding the consideration of the validity of the earlier will Exhibit B-5, found against the validity of Exhibit A-20. As regards accountability, he held that the defendant was liable to render accounts from 23rd April, 1959 only but till date and not upto 14th October, 1960 alone, accepting the cross-objections filed by the plaintiffs as regards the accounts for the later period. But on his finding on Exhibit A-20, the suit failed.

In this second appeal by the plaintiffs though the period of accountability has also been the subject of discussion, it is the validity of the will that has to be first determined and is the main question. The deceased Kuppan Chettiar was the eldest of three brothers, the next being the defendant Narayanan Chettiar. The third brother is Sethuraman Chettiar. The brothers became divided in 1952. Prior to the disputed will under consideration and the will evidenced by Exhibit B-5 referred to above, there was another will Exhibit A-3. Under Exhibit A-3 besides the plaintiffs the defendant also was appointed an executor and though the validity of Exhibits A-3 was never examined and even the other will Exhibit B-5 cancelled all the earlier wills, specifically referring also to Exhibit A-3, the learned Subordinate Judge would hold that Exhibit A-20 not being valid, Exhibit A-3 came into operation and that therefore the suit was not maintainable.

I may at the outset say that the discussion of the learned Subordinate Judge on the validity of Exhibit A-20 is far from satisfactory. It suffers from serious infirmities that vitiate the ultimate finding. In view of the order I now propose to pass in the matter, which I, in a way, indicated at the close of the argument. I shall not be going deep into the details of the case except to the extent necessitated for bringing out the infirmities in the approach.

As stated at the outset, the deceased who was separated from his brothers in 1952 had no male issue. He had four daughters. Paripoorna Achi the eldest, Chittal Achi, next, then Annapoorani and then Sivakami Achi. Paripoorna Achi, the eldest daughter, had a son and daughters. Her second daughter Kalyani is married to the defendant's son Ramanathan and the defendant by his son Ramanathan has four sons Vaidyanathan, Muthukumaran, Kuppan and another. The second plaintiff Chittal Achi has no issue. Sethuraman the last brother of the deceased has a son by name Arunachalam. The deceased had a concubine by name Kannammal in Malaya and through her he had three sons. The wife of the

deceased, namely, the 1st plaintiff in the suit has been a helpless invalid for over 15 years and had to be fed and looked after. The deceased who was suffering from high blood pressure when in Malaya had to enter hospital in Ipoh on 26th February, 1959 where he stayed for about 15 to 20 days. It is stated that his leg was affected a little and there were twitches in his face. After this attack, the deceased was anxious to return to India. There is some record regarding sale of his share in the business house to Vaidyanatha, the defendant's grandson, by his father and guardian Ramanathan. The evidence is that on 13th March, 1959 the deceased executed a will in the hospital at Ipoh, a copy of which is Exhibit B-5 above referred to. Later, on 21st March, 1959 the deceased accompanied by the defendant returned to India by plane and reached his village Amaravathiputhur by the car of the 3rd plaintiff. The deceased stayed right through at Amaravathiputhur till his death on 14th October, 1960. The defendant returned back to Malaya and Egammal Achi, the mother of the brothers, who was in the village died in Thai 1960. The deceased alone was then in India both of his brothers being at Malaya. The defendant who was admittedly managing the business of the deceased returned back to India in September, 1960, handing over the management of the business of the deceased to D.W. 7, son of Nagammai Achi. The house of the defendant was four houses off from the place where the deceased was living and the defendant stayed in India at the time of the death of his brother and thereafter for a time for his own sixty first birthday celebration which was on the 16th day of the death of Kuppan Chettiar. The will in dispute Exhibit A-20 was actually executed on 11th October, 1960. The scribe of the document is P.W. 3 a resident at Karaikudi, who is stated to be a well established document writer of the locality. The instrument has been typed by him. He received instructions from the deceased for the will, two days prior to the date of execution. He was fetched for the purpose by the 2nd plaintiff Chittal Achi the daughter, who was given evidence as P.W. 6.

* * * * *

The requirements for a valid will are well established and have been repeatedly laid down in decision after decision. The first requisite for a valid will is, the tesator must have known and approved the contents of the will. Whenever a will is prepared under circumstances which give reasonable room for suspicion that it does not express the mind of the testator, it is for those who put forward the will to remove the suspicion. It has also been laid down that when a will is prepared by or on the instructions of a person taking a benefit under, or a person getting substantial interest under the will takes a prominent part in the preparation of the will, it is a circumstance raising suspicion. When the benefit is large, the burden of proving the authenticity of the will will be heavy. But if the will is to be invalidated notwithstanding the discharge of the burden there must be evidence of the actual exercise of undue influence. In 'Theobald on Wills' Twelfth Edition, at page 33 it is set out thus:

> "the influence of a person standing in a fiduciary relation to the testator may lawfully be exercised to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is a free agent; and the burden of proof of undue influence lies upon those who asserts it."

The learned author observes at page 34 therein:

> "In the case of wills, when once it is proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence rests on the party who alleges this.
>
> To establish a case of undue influence, it must be shown that fraud or *coercion* has been practised on the testator in relation to the will itself, not merely in relation to other matters or transactions. A case of undue influence is more easily established where there is evidence to show that the person influenced was of feeble mental capacity or in a weak state of health".

The following passage in the said book is of considerable importance in the context of the present case.

> "A will which has been read over to the testator in a proper manner, or the contents of which have been brought to his notice before execution, must, in the absence of fraud, or coercion, be presumed to have been approved by him".

It will be useful also to refer here to some of the decisions placed before me by Counsel.

In *Mt. Gomtibai* v. *Kanchiedilal*[1], the Judicial Committee set out the legal position thus :

> "The law is well settled that the *onus probandi* lies on the person who propounds the will, and this onus is in general discharged by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed ; *Barry* v. *Butlin*[2]. But where a will is prepared and executed under circumstances which excite the suspicion of the Court :
>
> 'It is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document'. *Tyrrell* v. *Painton*."[3]

See also *Charles Harwood* v. *Baker*[4]:

> "Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent,"

that is, when the propounder of the will has discharged the onus :

> "the burden of proving that it was executed under undue influence is on the party who alleges it." *Boyse* v. *Rossborough*[5].

In the case just cited, it is also stated that :

> "influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by *coercion* or by fraud."

To the same effect is the statement in the earlier case, *Barry* v. *Butlin*[2].

> "The undue influence and the importunity which, if they are to defeat a will must be of the nature of fraud or duress".

As observed in *Craig* v. *Lamoureux*,[6] the burden of proving undue influence is not discharged by merely establishing :

> "that a person has the power unduly to overbear the will of the testator. It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained."

While the burden on the propounder of the will is to show that the testator executed the will in his right mind and with disposing mental capacity, the caveator to succeed and have the will thrown out should establish that the will was executed under undue influence and the evidence in regard to this must be of the exercise of influence either by *coercion* or by fraud. Mere persuasion and importunity which do not unduly overbear the will of the tesator would not be undue influence that would vitiate the will.

* * * * *

The case of the plaintiffs in regard to the execution of the will must be considered in the light of the defendant's case that the testator was wholly unconscious and that the will is a fabrication. That it is a result of undue influence and *coercion* is only a later development, emphasised at the appeal stage.

In *Bur Singh* v. *Uttam Singh*,[7] where the question was as to the capacity of a testator and it was alleged that undue influence had been exercised over him in the matter

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1. (1949) 2 M.L.J. 469.
2. (1838) 2 Moo P.C. 480.
3. L.R. (1894) P. 151.
4. (1840) 3 Moo. P.C. 282.
5. (1857) 6 H.L.C. 2 : 26 L.J Ch. 256.
6. L.R. (1920) A.C. 349.
7. (1911) I.L.R. 38 Cal. 355.

of execution while he was admittedly seriously ill, though the evidence was to the effect that he was in possession of his senses and understood what he was doing when he signed the will, the Judicial Committee remarked :

"The onus of proving the testamentary capacity of Ship Singh of course lies on those by whom the will is propounded, and in their Lordships' opinion they have discharged that obligation by the evidence indicated above. Such evidence is not displaced by mere proof of serious illness and of general intemperance, and yet that is as far as the evidence of the respondents can fairly be said to go. So far as the charge of undue influence is concerned, all that is shown on the part of those attacking the will is that there was motive and opportunity for the exercise of such influence by the defendants, and that some of them in fact benefited by the will to the exclusion of other relatives of equal or nearer degree. Circumstances of that character may sometimes suggest suspicion, and would certainly lead the Court in the present case to scrutinise with special care the evidence of those who propound the will ; but in order to set it aside there must be clear evidence that the undue influence was in fact exercised, or that the illness of the testator so affected his mental faculties as to make them unequal to the task of disposing of his property."

I should say that having regard to the evidence of the doctor and the Notary public and the other evidence in the instant case regarding the state of mind of the testator, there has not been hat examination of the defendant's case of exercise of influence in this case as is required in the passage above cited for invalidating the will.

* * * * *

The reasoning of the learned Subordinate Judge leaves the impression that the testator at the time of execution must have felt that he had no option but to put the thumb impression on the paper produced, that is he was cowed down by the presence of P.W. 6 and her husband. The execution of the will is not 'a hole and corner' affair. Respectable parties were on the scene at the execution. Dr. Subramaniam P.W. 2, affirms that the testator understood what was read over to him and that P.W. 1 the Notary Public and Advocate asked him whether he had understood the full implication of the terms in Exhibit A-20 and that the testator replied in the affirmative. Is it a csae of the deceased always at the tender mercies of P.W. 6 and her husband, who had been subjected to prior pressure fearing future persecution at their hands executing the will in their presence in accordance with their prior dictates, no doubt in the presence of disinterested witnesses? There is no suggestion in the evidence that none else than P.W. 6 and her husband had access to the deceased, during the relevant period. It is nobody's case that he was kept confined, his relatives and friends being shut off from all discourse with him. The defendant's house was only four houses away from the old joint family house in which the deceased was residing at the relevant period. The entire case of the defendant has been that the deceased was unconscious for 2 weeks before his death. He would state that he was with him when he expired. He admits that he had gone to see the deceased sometimes and would state that he never saw P.W. 1 and 3 in the house ; the eldest daughter of the deceased was also living in the same village and in the same street and it has ben elicited in the cross-examination of P.W. 6 that at times she used to come and call on the father and she was not inimical either to P.W. 6 or to the father, though she was not very much attached to her parents.

To start with, the disposition in Exhibit A-20 in favour of P.W. 6 in the context of the facts as revealed by the evidence is nothing unnatural; nor is it too large a gift. By itself it cannot lead to any inference of uudue influence on the part of P.W. 6. It need not appear strange, if the natural affections to one's own children and wife had asserted themselves and a special provision was made to one of the daughters, having regard to the fact that she had been attending on the father and being issueless may be expected to attend also on his invalid wife. She was living

in the adjoining premises. Certainly the provisions by themselves do not suggest that unless there was coercion and undue influence such provisions would not have been made. Assuming that P.W. 6 had pursuaded her father to make the life interest an absolute one, will that be undue influence? Certainly not. But to justify the decision of the learned Subordinate Judge that there was undue influence in this case, one has to hold that is so, for there is no evidence in this case to warrant an inference of undue influence, apart from the fact that there is no such plea.

In *Naresh Charan* v. *Paresh Charan*[1], where a son was practically disinherited and his children altogether ignored, the Supreme Court, after observing in the context of the fact of that case that the terms of the will cannot be relied upon as extrinsic evidence of undue influence, observes —

"Stripped of all its embellishments, the evidence of Indira, if true, comes only to this that the first respondent told his father that he could not live under the same roof with his brother, and that in view of that attitude, the testator gave no share to the appellant in the house. We are unable to see any undue influence in this. The first respondent was entitled to put forward his views in the matter, and so long as the ultimate decision lay with the testator and his mental capacity was unimpaired, there can be no question of undue influence.

It is elementary law that it is not every influence which is brought to bear on a testator that can be characterised as "undue". It is open to a person to plead his case before the testator and to persuade him to make a disposition in his favour. And if the testator retains his mental capacity, and there is no element of fraud or coercion, it has often been observed that undue influence may in the last analysis be brought under one or the other of these two categories-the will cannot be attacked on the ground of undue influence."

Their Lordships quote with approval the following passage from *Hall* v. *Hall*[2].

"But all influence are not unlawful, persuasion, appeal to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like—those are all legitimate and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to over power the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity or threats, such as the testator has the courage to resist, moral command asserted and yielded to for the sake of peace and quiet or of escaping from distress of mind or social discomfort—these, if carried to a degree in which the free play of the testator's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven, and his will must be the offspring of his own volition, and not the record of some one else."

In this case, at the most, one may suggest that P.W. 6 the daughter who was attending on the deceased might have persuaded her father to leave the land and house to her absolutely. It may also be said that she would have suggested that the wife should be given an equal share in the Indian assets, whatever the ultimate motive may be. But, can any element of fraud or coercion be brought in here? As I said earlier, there has been no suggestion of it. Nor is there any suggestion of restraint compelling him to particular bequests, and requiring him to give up his ideas of adoption. The only suggestion in cross examination of P.W. 6 that may have some relation to the question under consideration is the following :—

"It is not true that to defraud the grandson of defendant of his interest the properties of my father, we have all conspired together and brought into existence the will Exhibit A-20."

1. (1955) S C J. 293 : (1955) 1 S.C.R. 1035 : (S.C.) 183.
(1955) An.W.R. (S.C.) 183 : (1955) 1 M.L.J. 2. (1932) L R. 1 P. & D. 481 at 482.

Once it is found that the mental faculties of the testator were not affected, in the absence of proof that P.W. 6 did say or do anything, which would restrain the free exercise by the testator of his volition, the theory of undue influence cannot be sustained. The evidence does not disclose any specific act showing the exercise of undue influence. I am not discussing here certain other changes in the disputed will from the earlier wills, as their consideration, in the light of my above discussion, cannot advance the case of the defendant any further. They are deferred for the present.

The learned Counsel for the defendant submits that even if the burden is on the defendant to establish undue influence, fraud or coercion and he has failed to establish the same, that does not necessarily result in upholding the will, when there are suspicious circumstances relating to the execution and the evidence, though not sufficient to warrant a positive finding of undue influence, fraud or coercion, may be such as to leave in the mind of the Court a doubt as to the truth of the will. It is pointed out that the Court is not bound to pronounce for the will till the conscience of the Court was satisfied and the doubts and suspicions cleared up. Reference is made to the well known passage in *Venkatachala* v. *S. N. Thimmaiamma*[1], where among illustrations of the circumstances surrounding the execution of a will which may be considered as suspicious are found circumstances when the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. Referring to the suspicious circumstances it is said:

> " In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and unless it is satisfactorily discharged Courts would be reluctant to treat the document as the last will of the testator. It is true that if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the cavestors; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

But in this case the rejection of the will rests substantially on the plea of undue influence. The lower appellate Court does not say that the will has not been proved. It goes further and finds that it has been excuted by the exercise of undue influence by P.W.6. It is as a consequence of this positive finding the learned Subordinate Judge would hold that it was not executed by the testator in a sound disposing state of mind. It cannot be, on the judgment, said that if the finding of undue influence cannot be sustained, the ultimate decision would have still been the same. This is not even a case where the evidence only falls short of proof of undue influence while giving reason for the gravest suspicion of the exercise of undue influence. As I said at the outset, there has been an erroneous approach in the matter. The learned Subordinate Judge has mixed the enquiry into the sound state of mind and the question of undue influence and also overlooked that even if influence can be suspected, all influence would not be undue. True the Court may, if it doubts the competence of the testator, having regard to the surrounding circumstances, find against the will notwithstanding the fact that the caveator has failed to establish his positive case of unconsciousness for a period of two weeks prior to death. There again, the decision will have to be having regard to the surrounding circumstances. A caveator may have absolutely no knowledge of the testators health or mind and may be away from th scene. Another may contend

1. (1959) S.C.J. 507 : (1959) 1 S.C.R. (Supp.) 426 : A.I.R. 1959 S.C. 443.

that he had been on the scene and was with the testator right through and admittedly he might have had opportunities to visit the testator. All these factors will have to weigh in the determination of the issue involved. In *William Baker* v. *James Batt*[1], it is observed by Baron Parke:

> "In a Court of probate, where the *onus probandi* mostly undoubtedly lies upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied, that the paper in question does contain the last will and testament of the deceased, it is bound to pronounce its opinion that the instrument is not entitled to probate. And it may frequently happen that this may be the result of an enquiry in case of doubtful competence in particular, without the imputation of wilful perjury on either side; or it may be, the judge may not be satisfied on which side the perjury is committed, or whether it certainly exists."

As regards the disposing state of mind required of a testator, the Counsel referred me to *Re-Belliss: Polson* v. *Parrott*[2], where at page 248 is found the following passage:

> "The Judgment of the Privy Council in *Harwood* v. *Baker*[3], illustrated the mode in which the test of memory is applicable. It was a case where there had been exclusion of a relative, and the decisive question was formulated thus: 'Was the testator capable of recollecting who (his) relations were, of understanding their respective claims upon his regard and bounty and of deliberately forming an intelligent purpose of excluding them from any share in is property.' The Court of King's Bench in *Banks* v. *Goodfellow*[4], dealt both with cases of exclusion and of defective memory, and laid down the principle in the form in which it has since been applied. There are two passages from the Judgment: 'Though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testatmentary act in its different bearing the power to make a will remains.'
>
> 'The standard of capacity is the capacity on the part of the testator to comprehend the extent of the property to be disposed of and the nature of the claim of those he is excluding.'
>
> Citing with approval an American Authority the Court adopted these additional illustrative statements. 'By sound and disposing mind and memory it has not been understood that a testator must possess those qualities of the mind in the highest degree ....neither that he must possess them in as great a degree as he may formerly have done; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair and just testament.'
>
> In every day practice in probate cases, then, what is sought to be ascertained is; was the testator possessed of the degree of power in mind, memory and understanding which were needful for doing rationally what was in fact done."

The abovesaid passage, in my view, gives the test on which this case should be decided. Was the testator in this case possessed of that comprehension to judge whether the dispositions which he was making were fair in the circumstances in which he was placed and having regard to the claims of his bounty and his obligations. It is sufficient for him to possess that degree of understanding to judge the fairness in his own way and we cannot substitute our views of fairness. It is open to him to choose, who would be the object of his bounty and he may even disinherit whomsoever he pleases. He is the master of his properties and if, with sufficient intelligence to understand and appreciate that he was disposing of his properties once and for all and he would not be there to rectify, when the testament comes into

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1. (1838) 2 Moore P.C. 317 at 319-320.
2. (1929) 141 Law Times 215
3. (1840) 3 Moore P.C. 282
4. (1870) L.R. 5 Q.B. 549; 22 Law Times Reports 813.

effect, he makes his dispositions, *prima facie* the dispositions may not be open to question.

In *Harwood* v. *Baker*[1], where a will was executed by a testator on his death-bed in favour of his wife, to the exclusion of the other members of his family, the testator being of a weakened and impaired capacity at the time of the factum,it is said, while discussing, what would constitute the sound disposing mind:

"..........in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed, than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case, is not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.

If he had not the capacity required the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the dispositions, though the justice or injustice might cast some light upon the question as to his capacity."

I must here point out that in a case particularly like the one under consideration what the effect would be in the absence of a testament may also be considered. If the effect of the testament is to provide also for some one, who has claims on the testator and who would not otherwise inherit the estate if the testator should die intestate or make equitable distribution of his estate amongst the heirs according to their needs or his obligations and the will is rational in its face and fair in its dispositions making just adjustments in the devolution of the estate it is a matter which will speak in favour of the will. After setting out the test in the case cited above, the manner of approaching the evidence is set out thus:

"Keeping, therefore, in mind the principle, that in all cases, the party propounding the will is bound to prove, to the satisfaction of the Court, that the paper in question does contain the last will and testament of the deceased, and that this obligation is more especially cast upon him, when the evidence in the case shows that the mind of the testator was generally, about the time of its execution, incompetent to the exertion required for such a purpose; and further keeping in mind that the disposition in question was not in accordance with any purpose deliberately formed before his mind became enfeebled by disease,—we come to the examination of the witnesses, whose evidence is relied on as proving, that at the time of executing the will in question he was fully competent to form, and did deliberately form, the intention of leaving to his wife the whole of his property.................."

That is, does the evidence show that the testator at the time of the execution of the will did deliberately form the intention of making the dispositions as found in the will?

Mr. Sundaram Ayyar, for the respondent, referred to *Rani Purnima Devi* v. *Kumar Khagendra Narayan Deb*[2], and submitted that even where there are no allegations of undue influence fraud or coercion, it is the circumstances attending the execution of the will in this case that give rise to the doubt and it is for the propounder

1. (1840) 3 Moore P.C. 282-314: 50 Revised Reports 37.

2. (1962) 1 S.C.J. 725 : (1962) 2 An.W.R. (S C.) 27 : (1962) 3 S.C R. 195 : (1962) 2 M.L.J. (S.C.) 27.

of the will to satisfy the conscience of the Court. My attention was also drawn by the learned Counsel to *Surendra Nath* v. *Jnanendranath*[1], which the learned Subordinate Judge has relied upon. The learned Counsel emphasised, that it was a registered will that was found against them. But that case can have no bearing with reference to the context of the present case. The doctor who had been attending on the testatrix in that case was examined on behalf of the caveator. Under the will in question in that case the propounder who had been looking after and attending on the testatrix received the largest share of the benefit. The Court remarked that as regards the mental capacity of the testatrix, the first and foremost witness should have been the doctor under whose treatment the testatrix was. But that doctor spoke for the caveator.

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The evidence regarding the execution of the will is that the dispositions were agreeable to the testator's own wishes. The requirement as to the production of the draft is not a rule of thumb for establishing the validity of wills. It depends upon the circumstances.

I have dealt only with a few of the suspicious circumstances which have in a way influenced the learned Subordinate Judge in coming to his conclusion that there is undue influence in the matter. As the lower appellate Court has not considered the case from the other angle, namely, whether, notwithstanding the absence of proof of undue influence by the objector, there are suspicious circumstances clouding the execution, which call for examination, I propose to leave it to the lower appellate Court to consider whether it could be said that the testator fully conscious of the nature of the dispositions he was making, executed the will and whether there are any reasonable and leigitimate doubts in regard to the execution that call for explanation. The circumstances on which undue influence was founded by the Subordinate Judge may in part be evidence for the plea of absence of a sound disposing state of mind. While evidence not sufficient for an inference that the testator was not of sound mind, would not be sufficient to prove undue influence, in the reverse, it may not always be so. To a certain extent the discussion may overlap. But the question will have to be examined separately. It is needless to state, as pointed out by the Supreme Court, that as in the case of proving all other documents so in the case of proving of wills, it would be idle to expect proof with mathematical certainty. But if the judicial mind is not satisfied, and is doubtful if the whole truth has come out, when it feels that there must be perjury on one side or the other and on which side the perjury is committed, and the competence of the testator is doubtful, it may hold that the will has not been proved. The test to be applied is the usual test of satisfaction of the prudent mind in such matters. No doubt, as the testator is not there to affirm or deny whether he made the dispositions as presented in the will, an element of solemnity is introduced, in the matter. Herein comes the phrase taken from Ecclesiastical Law 'satisfaction of the conscience of the Court.' But the very solemnity of the proceedings requires having regard to the fact that the enactment is no more there to state one way or the other, that the Court should not also lightly strike down a will, fair and rational on its face and proved to have been duly signed by the testator in the presence of attesting witnesses, when apparently in sound disposing state of mind. As observed by Lord Du Parcq in *Earmes* v. *Hinkson*[2].

"Those rules enjoin a reasonable scepticism not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth."

The fact that it is said 'conscience' has to function in the matter should not make the Court hesitant, to probe deeper into the matter for discovering the truth,

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1. A I R. 1932 Cal. 574
2. A.I.R. 1946 P.C. 156 at 163 : (1946) 2 M.L.J. 156.

where necessary. Conscience has to function whether it is finding for or against the will.

It follows that the finding of the learned Subordinate Judge on the will as it stands cannot be sustained. His finding that the will is vitiated by the exercise of undue influence by P.W. 6 is not in accordance with law and is untenable. The validity of the will has to be considered *de hors*, the finding of undue influence which is a separate matter, in the light of the principles above enunciated. Whether after the finding against undue influence there are left legitimate doubts which call upon the Court to be vigilant and zealous in the examination of the evidence in support of the will and whether the conscience of the Court in this regard is satisfied are in the end questions of fact. I prefer to have a fresh consideration of the same by the lower appellate Court. I am therefore sending down the matter for a fresh finding by the lower appellate Court on the question whether the plaintiffs have proved that the will Exhibit A-20 dated 11th October, 1960 is the last will and testament of Kuppan Chettiar executed by him when he was in a sound disposing state of mind? The learned Subordinate Judge will freely deal with the matter on the merits, except in regard to the features which have been examined by me and specific findings given. No fresh evidence. The question as to the period of accountability will be taken up after receipt of the finding.

Time for submission of finding eight weeks from the date of receipt of the records by the lower appellate Court. Objections, if any, to the finding 10 days after submission of the findings.

After the return of the finding the Court delivered the following :—

JUDGMENT*—The learned Subordinate Judge has returned his finding that the testator was possessed of a sound state of mind at the time he executed the will, Exhibit A-20, that he knew as to what he was doing and was able to discern and possessed that degree of power of mind, memory and understanding needed for the valid execution of the will. No objections have been filed to this finding by the respondents in the appeal and quite properly as the learned subordinate Judge has considered every material aspect and piece of evidence on record on the issue sent to him for determination, in the light of established principles, and the finding has moved into the realm of pure fact.

* * * *

The learned Subordinate Judge in the first instance dismissed the suit in its entirety on his finding that the will Exhibit A-20 was not valid. As that finding is now found to be erroneous, the plaintiffs' right to claim accounts from the first defendant has been established and the decree for accounting has to follow.

In the result, the decree of the trial Court providing for the first defendant to render accounts of his agency of the deceased Kuppan Chettiar's firm at Ipoh is restored, subject to the modification, the liability to account shall be from 23rd April, 1958 and up-to-date. The Second appeal is allowed accordingly, the decree and the judgment of the lower appellate Court being set aside. The parties will bear their respective costs throughout. The executors may have their costs throughout from the estate. No leave.

V.K. *Appeal allowed.*

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*16th August, 1968.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

V. Muthuswami Gounder .. *Appellant**

v.

Thulasi Ammal .. *Respondent.*

Motor Vehicles Act (IV of 1939), *section* 31—*Scope—Transfer of ownership of motor vehicle registered under the Act—Sale, if gets completed before the transfer of the registration certificate.*

Motor Vehilces Act (IV of 1939), *sections* 110 *and* 110-*A to* 110-*F—Scope—Accident arising out of the use of motor vehicles—Claim for compensation for loss suffered to property—Civil Court Claims Tribunal, if could exersise jurisdiction.*

Under section 31 of the Motor Vehilces Act where the ownership of any motor vehicle registered under the Act is transferred, it is the duty of the transferor to report the transfer within fourteen days of the transfer to the registering authority sending a copy of the report to the transferee. Also the transferee shall, within thirty days of the transfer, report to the registering authority the fact of transfer of ownership. A reading of section 31 shows that the contractual transfer of ownership of a vehicle has to precede the application for transfer of ownership. As between the transferor and transferee, the sale gets completed before the transfer of the registration certificate. The failure to report the transfer may involve some penalties under the law. But that certainly does not interdict the passing of property in the vehicle to the transferee.

Reading section 110 and 110-A to 110-F of the Act, it is clear that where no death or personal injury results in an accident arising out of the use of motor vehicles but the claim for compensation is for loss suffered to property such claim has to be preferred in a Civil Court. This claim for damages to a vehicle by the wrongful act of the opposite party is a common law action in tort. The gist of the action is trespass to goods and the person who could complain of the trespass and consequential damages, must have the present possession of the property either actual or constructive or must have legal right to its immediate possession. For the purpose of the action as a general rule, the master is treated as being legally in possession of the property which is in the actual physical custody of his servant, the servant being the conduit through whom the master exercises his legal right.

Appeal against the Decree of the District Court (II Additional Judge) Coimbatore in Appeal Suit No. 158 of 1963 preferred against the decree of the Court of the Principal District Munsif of Coimbatore in Original Suit No. 1051 of 1961.

K. Parasurama Iyer, for Appellant.

K. Ramaswamy, A. Sarojini Bai, and *R. Kamala,* for Respondent.

The Court delivered the following

JUDGMENT :—The 1st defendant in a suit for recovery of damages caused to an auto-rickshaw on account of collision with his car, has preferred this second appeal. The 2nd defendant was the 1st defendant's driver. He was driving the car in the course of employment under the 1st defendant.

The plaintiff was plying the auto-rickshaw for hire and her son who has given evidence as P.W. 1 was driving the said auto-rickshaw at the time of the accident. The Courts below have concurred in finding that the collision by which the auto-rickshaw was damaged was due to the rash and negligent act of the 1st defendnt's driver. Damages have been assessed by the Courts below at a sum of Rs. 1,200. The finding that the accident was due to the rash and negligent driving of the car by the 1st defendant's driver and the quantum of damages assessed are findings of fact,

* S.A. No. 275 of 1965. 7th March, 1969.

not open to impeachment in second appeal. Learned Counsel for the appellant submitted that, in assessing the damages, the Courts below have failed to advert to certain discrepancies in the dates of bills exhibited to prove purchase of damaged parts for the auto-rickshaw. No point has been made in the Courts below of any such discrepancy. Nor is the discrepancy irreconcilable with the plaintiff's case. The substantial point raised by learned Counsel for the appellant is the *locus standi* of the plaintiff to institute the suit and claim damages.

The auto-rickshaw in question was purchased by the plaintiff from one Ponnuswami for a sum of Rs. 6,150 about two years prior to the accident. This Ponnuswami himself had purchased it from another party, entering into an hire-purchase agreement with one Ramanathan Chettiar. The registration certificate for the vehicle stands in the name of Ponnuswami, and there is an entry about the hire-purchase agreement in the registration certificate. There has been no transfer of the registration certificate in the name of the plaintiff after her purchase from Ponnuswami. The purchase by the plaintiff was subject to liability under the hire-purchase agreement and statutory intimation of the sale in favour of the plaintiff was given to the registering authority. But the registering authority has not recorded the transfer of ownership in the registration certificate, as Ramanathan Chettiar was not willing to give his consent for transfer of registration till the amount due under the hire-purchase agreement was fully paid. Ponnuswami has given evidence as P.W. 2 about his sale of the vehicle to the plaintiff, and there is no dispute that factually the property in the vehicle has been transferred by the registered owner Ponnuswami to the plaintiff. The objection raised for the 1st defendant is, that without a transfer of the registration certificate in her name, the plaintiff cannot claim to be the owner of the vehicle and sue for damages caused to it. Learned Counsel for the appellant relies on the provisions of the Motor Vehicles Act, Act IV of 1939, to non-suit the plaintiff. It is submitted that, unless there is a transfer of ownership as provided under section 31 of the Act, the ownership of the vehicle remains with the registered owner. The transfer of ownership of the motor vehicle it is said is not complete without a change of registry.

Counsel for the appellant would rely for his contention on *Vimal Rai* v. *Gurcharam Singh*[1], and *Mohan Lal* v. *Kumari Babbi*[2], Both these cases relate to claims before the Motor Accidents Claims Tribunal constituted under Chapter VIII of the Motor Vehicles Act. In the first case in a running down action, the question arose whether the insurance policy lapsed with the factual transfer, even before the transfer of the registration certificate by the Registering Authority. The registered owner repudiated liability on the ground that he had sold the vehicle prior to the accident. It was held that a mere parting with the possession of a motor vehicle without the transfer of the ownership in the records of the Registering Authority under the Act would not result in the lapse of the insurance policy covering the vehicle, and that, even though there might have been a sale, the insurance policy *qua* third parties would continue to subsist until the ownership of the vehicle was transferred in accordance with the provisions of section 31 of the Motor Vehicles Act. It was said that the general principles of insurance regarding the lapse of an insurance policy immediately upon the sale would not apply to motor vehicles which are governed by the special law. The learned Judge Andley J., observes that a perusal of the various provisions of the Act leads to only one conclusion that ownership of a motor vehicle is to as evidenced by the registration as such with the Motor Registering Authority and the registration book which is supplied is the document of title. The learned Judge said:

> " I think the Act proceeds on the basis that it is only the ostensible owner who is entered as such in the registration books, who is to be considered to be the owner of the motor vehicle irrespective of the fact that the real ownership may be with somebody else."

1. (1967) A.C.J. 115. 2. (1967) A.C.J. 126.

In *Mohan Lal* v. *Kumari Babbi*[1], the insured sought to escape liability on the ground that the actual owner was someone else. It was held that the fact that the vehicle was insured in his name coupled with other circumstances proved that the insured was owner of the vehicle. These two cases relating to insurance liability of a registered owner or the insured are not relevant in the context of the problem before us. Whereas the above two cases were concerned with claims cognizable by the Motor Accidents Claims Tribunal, the instant case is concerned with a common law liability in tort. Those two cases even on their reasoning are not in my view authority for the position that an actual owner of a vehicle who has suffered damage by collision cannot claim relief.

Under section 31 of the Motor Vehicles Act, where the ownership of any motor vehicle registered under the Act is transferred, it is the duty of the transferor to report the transfer within fourteen days of the transfer to the registering authority sending a copy of the report to the transferee. Also the transferee shall, within thirty days of the transfer, report to the registering authority the fact of transfer of ownership. A reading of section 31 shows that the contractual transfer of ownership of a vehicle has to precede the application for transfer of ownership. As between the transferor and transferee, the sale gets completed before the transfer of the registration certificate. The failure to report the transfer may involve some penalties under the law. But that certainly does not interdict the passing of property, in the vehicle to the transferee. As observed in *Mehtab Singh* v. *N. F. & G. I. Company*[2], all that is required under the Act is that the transfer has to be notified otherwise certain penal consequences follow, but that does not made the transfer invalid. The moment the sale is effected of the vehicle intending to pass the property therein forthwith, *vis-a-vis* the vehicle, the registered owner ceases to have any proprietary interest. It may be that, till there is an endorsement on the registration certificate, ostenasibly the transferor is the owner. But the beneficial interest, including the right to possession, vests in the transferee.

The Motor Vehicles Act regulates and controls the running of vehicles in public places and in other places for the purpose of carrying passengers or goods. It does not deal with the passing of property in and legal title to the property. The definition of " owner " in section 2 (19) of the Act is not a complete definition. In fact, it cannot be considered to be a definition, as it merely describes as owners two classes of persons who would not, under the ordinary use of the word " owner," be said to be owners. Section 2 (19) states that, where the person in possession of motor vehicle is a minor the guardian of such minor would be the owner, and that, where the motor vehicle is the subject of a hire purchase agreement the person in possession of the vehicles under that agreement would be the owner. The sub-section does not exclude persons who are otherwise owners from the coverage of the expression it being not an exhaustive definition. A person in whom title to the vehicle vests and who has legal right to possession of the vehicle, does not cease to be the owner even for the purpose of the Act, *Uma Shanker* v. *Rex*[3]. In Halsbury's Laws of England, Simonds Edition, Vol. 31, at page 447, it is pointed out that, while the registration book is issued to the owner of the vehicle, that is, the person by whom the vehicle is kept and used and although provision is made for changes of ownership to be recorded in the registration book, the name appearing in the registration book may not be that of the legal owner of the vehicle. The registration book is not a document of title but is evidence of title and its absence at the time of sale would put a purchaser on inquiry.

About the jurisdiction of the Civil Court, Claims Tribunals have been constituted under section 110 of the Act for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles. Counsel for the respondent draws my attention to a decision of this Court in *Selvaraj* v. *Jagannathan*[4], where it was held

1. (1967) A.C J. 123.
2. A.I.R. 1963 Punj. 103 at 104.
3. A I.R. 1950 All 234.
4. (1969) A.C.J. 1.

that the Claims Tribunal has no jurisdiction to try any claim other than the one defined in section 110 (1) that is, a claim for compensation in respect of accidents arising out of the use of motor vehicles. This Court upheld the exclusive jurisdiction of the Civil Court to try the suit in so far as it related to the claim for such compensation, observing *inter alia*, that, if the claim in respect of loss of property was inextricably bound up with the claim in respect of personal injury, the entire claim would be within the purview of the Civil Court. In taking this view this Court differed from the decision of Madhya Pradesh High Court in *Om Prakash* v. *National Fire and General Insurance Co. Ltd.*[1]. There is no room for controversy in the instant case, as the claim is wholly in respect of damage to the plaintiff's vehicle. Reading section 110 and 110-A to 110-F of the Act, one thing is clear and beyond controversy that, where no death or personal injury results in an accident arising out of the use of motor vehicles but the claim for compensation is for loss suffered to property such claim has to be preferred in a civil Court. The claim for damages to a vehicle by the wrongful act of the opposite party is a common law action in tort. The gist of the action is trespass to goods and the person who could complain of the trespass and consequential damages must have the present possession of the property either actual or constructive or must have legal right to its immediate possession. For the purpose of the action as a general rule, the master is treated as being legally in possession of the property which is in the actual physical custody of his servant, the servant being a conduit through whom the master exercises his legal right. In the present case, the legal right to the possession of the property was in the plaintiff at the time of the accident and the damage was to her property. The objection to the maintainability of the suit by the plaintiff, therefore, fails.

In the result the second appeal is dismissed with costs. No leave.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

Maimoon Bivi and another .. *Appellants**

v.

O. A. Khaja Mohideen and another .. *Respondents.*

Muhammadan Law—Purchase of the property in the name of a widow—Widow not in the management of the common properties of the heirs of her husband—Property purchased, if an accretion to the common estate.

The question for determination is whether the 2nd schedule property in question (standing in the name of a muslim woman and purchased by her) was acquired with the income from the 1st schedule properties (her husband's) as an accretion to the common estate of this heirs of her husband as pleaded by the plaintiff.

Held that, under the Muhammadan law, a widow was not the property guardian of the minors (a son and a daughter). Nor was the maternal grandfather who was actually in management of the properties, guardian of the minors. He had assumed management of the family properties for the benefit of the co-heirs. The 1st defendant (widow) was not occupying any fiduciary position with reference to her children and the management of the properties was in the hands of her father. If the 1st defendant's father was a well-to-do person, why should one assume that he was not providing his daughter with funds, for the expenses but was making the purchase in her name for the benefit of the co-owners? He could have even given her portions of the income from the estate for her personal use. If she had been given funds from the estate, in any accounting she will have to be debited with the drawings from the estate. If she has overdrawn, she will have to refund. But there can be no presumption that the purchase in the name of the 1st defendant who was not in management of the common property

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1. A.I.R. 1962 M.P. 19.

* L.P.A. No. 83 of 1964. 4th March, 1969.

was for the estate. Evidence oral and documentary, is also clear that the acquisition of the 2nd schedule property was for the exclusive benefit of the 1st defendant and not as representing the co-heirs.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Kailasam, dated 30th March, 1964 and passed in A.S. No. 402 of 1961 preferred against the decree of the Court of the Principal Subordinate Judge, Tirunelveli and passed in O.S. No. 61 of 1958.

A. Sundaram Iyer, S. M. Abdul Khader and S. M. Amjadnainar, for Appellants.

S. V. Venugopalachari and *S. Padmanabhan*, for Respondents.

The Judgment of the Court was delivered by

Natesan, J.—This is an appeal under the Letters Patent from the judgment of our learned brother Kailasam, J. in a regular first appeal. The suit is one for partition of the properties of a deceased Muhammadan, Ahmed Meeran who died in March, 1943 leaving as his heirs his widow Maimoon Bivi, minor son Khaja Mohideen and minor daughter Mohideen Bathammal, filed by Khaja Mohideen after becoming a major. The widow, the chief contestant in the suit, is the 1st defendant. The minor daughter of the deceased represented by her husband as guardian is the 3rd defendant. She became a major *pendente lite*. The suit properties comprise the plaint 1st and 2nd schedule properties. The 1st schedule properties were secured as the 2/3rd share of the deceased Ahmed Meeran in his father's estate under the decree in O.S. No. 329 of 1943 on the file of the District Munsif's Court, Tirunelveli. The 2nd schedule property stands in the name of the widow the 1st defendant, under a purchase as per the original of Exhibit A-1 13th March, 1955. It is the case of the plaintiff that the 2nd schedule property, though standing in the name of the 1st defendant, has to be partitioned among the heirs of the deceased Ahmed Meeran, as the property was purchased in the name of the 1st defendant with the surplus income from the 1st schedule properties for the benefit of all the heirs. There is no dispute as regards the 1st schedule properties and the shares the parties are entitled to therein the plaintiff to a 14/24th share the 1st defendant to a 3/24th share and the daughter, the 3rd defendant to the remaining 7/24th share. The contest is only in respect of the 2nd schedule property which the 1st defendant claims to be an acquisition made by her for herself. The learned Subordinate Judge upheld the 1st defendant's exclusive right to the 2nd schedule property and granted a preliminary decree for partition of the 1st schedule properties except item 9. On appeal to this Court, our learned brother Kailasam, J. allowed the appeal upholding the plaintiff's claim for partition of the 2nd schedule property also. The Letters Patent Appeal is directed against the variation of the decree in respect of the 2nd schedule property.

The short question for consideration is whether the 2nd schedule property was acquired with the income from the 1st schedule properties as an accretion to the common estate as pleaded by the plaintiff. The common case of the parties is that, after the death of her husband, the 1st defendant along with her children was living in her father's house, and that her father was looking after the 1st schedule properties. He was spending out the income from the properties for the maintenance of the 1st defendant and her children as well as for education of the children. It is an admitted fact that he was a well-to-do person. He died on 3rd October, 1955. It is the plaintiff's case that the maternal grandfather purchased the 2nd schedule property with the surplus income from the 1st schedule properties. The 1st defendant would contend that she had funds of her own, that she used to earn by doing yarn winding, stitching and embroidery work, that her father also used to give her moneys, that she lent out the moneys and after realising moneys lent she purchased the 2nd schedule property.

To start with, certain principles have to be borne in mind while considering the claims made in this case and examining the evidence on record in relation thereto. We are here concerned with a property acquired by a Muslim woman at a time when her husband's estate was owned in common by her along with other heirs,

her children. Another important feature is that the common properties were in the management of her father. She was an adult and the other co-heirs were minor. Under the Muhammadan law, she was not the property guardian of the minors. Nor was the maternal grandfather who was actually in management of the properties, guardian of the minor's. He had assumed management of the family properties, no doubt, for the benefit of the co-heirs. It is well established that, even in the case of a joint Hindu family where there is sufficient nucleus, there is no presumption that property standing in the name of a female member of the family is joint family property. As pointed out in *Abdul Samad Khan Khiladar* v. *Bibijan*[1], there is no provision in Muhammadan Law that the acquisitions of the several members of a family are made for the benefit of the family jointly; and the principles and presumptions applicable to the case of a joint Hindu family are not applicable to a Muhammadan family. At the moment of his death the estate of a deceased Muhammadan devolves on his heirs and they take the estate as tenants-in-common in specific shares. The theory of representation is not recognised under the Muhammadan Law and the interest of each heir is separate and distinct. As observed in *Abdul Hack* v. *Sesthamsetti Jaya Rao*[2], children in a Muhammadan family are not co-owners in the sense that what is purchased by one person enures for the benefit of another. In that case, the children of a deceased Muhammadan were minors at the time of his death and their paternal uncle who managed the properties on their behalf purchased some property in the name of one of the minor's. The contention that in as much as the property was purchased in the name of a minor it must be taken to have been purchased for the benefit of the whole family, was rejected. But, as there was evidence that some cash left by the deceased was utilised for the purchase, it was held that to the extent the amount was taken for the purchase from the general estate the minor in whose name the property was purchased had to give credit to the estate for the amount. It was said that when accounts were taken the family would be entitled to debit against he person in whose name the property was purchased the amounts utilised for the purchase, and that the fact that the property was purchased by him with money taken from the father's estate would not make the property the common property of the family. We may here usefully refer the following observations of ours in *Venkatasubramania* v *Eswara Aiyar*[3].

> "Amongst tenants-in-common where one tenant-in-common acquires property in his individual right with no intention of making it common property, the property will not be divisible....As noticed in *Kennedy* v. *De Trafford*[4], there is no fiduciary relation between tenants-in-common of real estate as such. Nor can one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character. A co-sharer would continue to account for the rents and profits received by him in excess of his share; but even if he fails to maintain separate account of his lawful share and is in possession of excess profits, the funds collected by him do not get impressed with the character of joint funds. There is no trust in favour of the persons who have not joined in the acquisition of the profits or in investments."

As to section 90 of the Trusts Act, for it to apply, it must be established that the party against whom relief is sought availed himself of his position as co-owner and gained an advantage in derogation of the rights of other persons interested in the property, or as representing all persons interested in the property gained an advantage. Then, of course, he must hold the advantage gained for the benefit of the other persons interested in the property, but subject to their obligation to share the expenses incurred in acquiring the advantage.

In the present case, admittedly, the management of the common properties was not with the 1st defendant. The management was by the 1st defendant's

1. (1925) 49 M.L.J. 675.
2. (1927) 106 I.C. 76.
3. I.L.R. (1966) 1 Mad. 468 : (1966) 1 M.L.J. 471 : A.I.R. 1966 Mad. 266 at 289.
4. L.R. (1897) A.C. 180.

father for the benefit of the 1st defendant and her children and the purchase was made in her name. To make the property acquired in her name partible, it must be established that the property was purchased in her name as representative of the common estate. It cannot be said that the 1st defendant had gained an advantage in derogation of her minor children, as she was not in management of the estate. The case of the 1st defendant is that the funds of the joint family were not utilised for the purchase of the property, and that it was out of her own earnings, to which was also added moneys given to her by her father, that the property was purchased. True, if it is found that the purchase had been made by the grandfather from out of the surplus in his hands, taking the sale deed in the name of his daughter, the then adult co-owner of the properties, a case for partition of the property between the co-owners may be held made out. But the burden in this respect is on the party claiming that it is an acquisition in the name of the 1st defendant for and as representative of the co-owners.

The plaintiff relied principally on the evidence of his maternal uncle, the brother of the 1st defendant who has given evidence as P.W. 2 and, the account book Exhibit A-2 on which our learned brother Kailasam, J., rested his decision. Learned Counsel for the plaintiff had to concede that, if the account book Exhibit A-2 and the evidence of P.W. 2 are rejected, the plaintiff has no case for partition of the 2nd schedule property. The learned trial Judge who heard and saw the witness has rejected the oral evidence of P.W. 2, and, as regards the account book, Exhibit A-2, he concluded that Exhibit A-2 is not a genuine account book and that it was cooked up for the purpose of the suit. Mr. S. V. Venugopalachari, Counsel for the plaintiff contended that the questions whether Exhibit A-2 is a genuine account or not or whether the evidence of P.W. 2 should be accepted are not, are pure questions of fact, in respect of which this Court in Letters Patent appeal would not reassess the evidence. It is said that the matter is now at the second appellate stage. We cannot agree. The appeal under clause 15 of the Letters Patent is in the nature of re-hearing of the appeal. While there is a specific inhibition under section 100, Civil Procedure Code, against interference on facts in second appeal, there is no such inhibition under clause 15 of the Letters Patent. Clause 15 is differently worded from section 100, Civil Procedure Code, and the appeal before us is from a judgment in a regular appeal under section 96, Civil Procedure Code, heard by a single Judge of this Court. Our attention has not been drawn to any rule of law that a finding, arrived at by single Judge of the High Court in first appeal, is not open to be challenged on facts under clause 15 of the Letters Patent. Of course, in a Letters Patent appeal, this Court will give the utmost consideration to an inference of fact made by learned single Judge of this Court and will be hesitant to differ from the same. But there are cases and cases and we are concerned with the reversel of finding of fact depending to an extent on the credibility of witnesses assessed against by the trial Judge who heard and saw the witnesses. Having regard to this aspect, we cannot, as desired by learned Counsel for the plaintiff, at the outset refuse to re-examine the evidence ourselves. Only when there is no question as to the truthfulness of a witness and the question is as to the proper inference to be drawn from truthful evidence, the original Court is in no better position to decide the matter than the appellate Court.

Of the two witnesses for the plaintiff, P.W. 1 (Plaintiff) was at all material time a minor. P.W. 2, the brother of the 1st defendant, is the principal witness. There is evidence on record that P.W. 2 and the 1st defendant have been on inimical terms ever since the 1st defendant took another husband in 1958. The second husband has been impleaded as second defendant in the suit. The sale deed reads as if the consideration for purchase of the property proceeded from the 1st defendant. There are no words in the sale deed to indicate that the purchase was made with the income from the 1st schedule properties. The 1st defendant's father had assisted in bringing out the sale in the name of the 1st defendant. As already stated, the

plaintiff rested on the account book, Exhibit A-2, to establish that the purchase was made with the income from the 1st schedule properties. In the evidence of P.Ws. 1 and 2, it is brought out that the account book had been maintained by the plaintiff's maternal grandfather, and, after his death, by P.W. 2 and the plaintiff. The learned Subordinate Judge examined the evidence relating to the maintenance of the account book and rejected it. Our learned brother, with little discussion on the matter, observing that a look at Exhibit A-2 does not warrant the statement of the trial Court that the entries are made in different hand and in different inks, concludes that he cannot accept the finding of the trial Court that Exhibit A-2 is nct a genuine account book. It is brought to our notice by learned Counsel for the appellant that certain vital features which show that the account book cannot be accepted as a genuine one have not been adverted to by the learned Judge.

First and foremost it is said that the account book has not been kept in the regular course of business. The account book starts with entries dating from 31st January, 1943 and is brought up to 31st August, 1958. It purports to be maintained for the estate of the co-heirs, and, if the entries therein are accepted, the account book does show substantial surplus income available form the estate for purchase of the 2nd schedule property. Under date 13th March, 1955, we find debits relating to the purchase of 2nd schedule property against the available surplus. If these entries are held proved, it must be taken as established that the acquisition is for the benefit of all the co-owners. We have carefully perused the account book ourselves and we may at once say that its appearance does not inspire confidence. P.W. 2 claims to have been writing this account book from 1943. About that time he must have been 16 years old. Admittedly he was in S.S.L.C. in 1947 and he might have been studying in 6th or 7th standard then. The writings in the account book in English, there are a few of them at that time, leave alone Tamil words, appears to us too settled to be that of P.W. 2 in 1943. For comparison we have his signatures to his deposition made 17 years after. We have stretches of varied writing. Admittedly three persons have written the accounts. The plaintiff as P.W. 1 states that the account book is in the hand writing of P.W. 2, the sister of P.W. 2 one Pathama Bibi, and P.W. 1 Both the plaintiff and P.W. 2 would say that all the entries in the account book appear to have been written with the same ink. The plaintiff would state that his grandfather had maintained a rough account book for moneys spent by him for his own transactions and that he knew to write. Only, the plaintiff would state that the grandfather could not write clearly as in exhibit A-2 and that all his accounts were written both by him and his uncle P.W. 2. The account book of the grandfather is not produced. But P.W. 2 would say that his father did not keep accounts of his income. P.W. 2 would admit that his father was literate, but that he could not write due to shake in his hand. P.W. 2's sister who is said to have made some entries in the account book, has not gone into the witness-box. The 1st defendant would state that her father was writing account. According to the 1st defendant, he did not keep separate account for the estate of the plaintiff's father and the accounts were written in a thick leather bound book. P.W. 2 who must know more about the account book than the plaintiff who was an infant at the material period, does not speak to other persons making entries in the account book and says that same ink was used for exhibit A-2. Admittedly, he was the writer at least of a major of the accounts; but our learned brother observes that entries have been made in different inks. Neither the plaintiff as P.W. 1, nor P.W. 2 specifically state as to who wrote the entries in Exhibit A-2 relating to the disputed purchases. The entries about the purchase and the disbursement of the consideration, inclusive of advance, are under one date, 13th March, 1955. Admittedly, the advance of Rs. 51 was paid about a week prior to that date. A mortgage over the property is directed to be discharged and the account shows that the cash for discharge of the mortgage was paid on 13th March, 1955 at the Registrar's office. The discharged mortgage deed has not been exhibited. We suggested to Counsel on both sides that unimpeachable documentary evidence of the date on which the

amount was paid in discharge of the mortgage may help in assessing the evidence. Counsel on both sides have secured registration copies of the receipt giving discharge of the mortgage receiving out of the consideration of the sale the sum of Rs. 1,405 due for the mortgage. The document bears the date 13th March, 1955. But it was registered on 16th March, 1955 and the Registrar records that the amount of Rs. 1,405 was paid before him to the mortgagee. Mr. S. V. Venugopalachari would explain the position by stating that the discharge receipt was got ready on 13th March, 1955 itself showing receipt of consideration before the Registrar on that date, but that the receipt was presented for registration on 16th March, 1955. Learned Counsel submits that the money might have been formally given before the Registrar as the receipt executed on 13th March, 1955 so recited and wants an opportunity for his client to explain the position. As in our view the document cannot be relied on by the 1st defendant as indubitable evidence to falsify the accounts, if the accounts are otherwise found acceptable, little can be made of the discrepancy and we are not admitting the document as additional evidence. But from the fact that the advance has not been entered when paid, it is clear that the account book has not been kept in regular course of business even assuming that it is not a recent fabrication. Also the entries in the account themselves have not been proved, to place reliance on the book. In our view, the trial Judge's rejection of the account book is justified. The account book which the plaintiff would state was maintained by his grandfather is not before the Court. The first defendant specifically refers to such an account. P.W. 2 cautiously avoids reference to it. At the same time he does not speak to the other persons who wrote the account book Exhibit A-2. Once the account book is rejected, there is no evidence on record to make out that the purchase was made with surplus funds from the estate of the plaintiffs' father for the benefit of the co-owners.

The learned trial Judge examined the other aspect whether the 1st defendant could have found money for the purchase in question. Admittedly, her father was a well-to-do person and she was living with him. He found that there was evidence oral and documentary, to show that the first defendant was possessed of sufficient funds at the time of the purchase of the 2nd schedule property. Our learned brother Kailasam, J., referring to the promissory notes which have been relied upon by the first defendant, observed that, even if they were genuine, that would not prove that the moneys advanced were those of the 1st defendant. It is nobody's case that her father lent out income from the estate in the name of the first defendant. The trial Judge, in holding that the 1st defendant could have found the necessary funds for purchase of the property, refers particularly to an agreement, Exhibit B-5, dated 7th January, 1953 executed by D.W. 2 in favour of the 1st defendant relating to an advance of a sum of Rs. 1,500 by the 1st defendant to D.W. 2 on pledge of certain jewels. This has been discharged on 2nd February, 1955 as evidenced by Exhibit B-6. The trial Judge observes that, though certain promissory notes relied upon by the 1st defendant are attacked as faked up pronotes, Exhibit B-6 was not attacked as such. In the circumstances, Exhibit B-6 will be a valuable piece of evidence showing available resources for the 1st defendant to make the purchase. Another important piece of evidence which our learned brother has not considered is the evidence of D.W. 4, Velayudha Thevar who was admittedly a tenant in possession of the property. He had been cultivating the property for some years, even before its purchase in the name of the 1st defendant. He deposes to his having brought about the sale of the 2nd schedule property. He states that he told the 1st defendant's mother about the sale of the property, and that the 1st defendant's father consulted the 1st defendant with reference to the sale. He speaks to the fact that the 1st defendant was collecting rent from the thrashing floor. Of course he does not know who actually paid the consideration for the sale. The trial Court saw no reason to reject the evidence of D.Ws. 2 and 3 who had borrowed moneys from the 1st defendant. As we have pointed out already, our learned brother would observe that, if the promissory notes were true, that does not prove that it was her own moneys which she had advanced. Assuming that her father had given her some moneys and helped her in the purchase of the property, that

will not, by itself, make the purchase one for the benefit of the co-owners. The 1st defendant herself was not occupying any fiduciary position with reference to her children and the management of the properties was in the hands of her father. If the 1st defendant's father was a well-to-do person, why should one assume that he was not providing his daughter with funds for the expenses but as making the purchase in her name for the benefit of the co-owners? He could have even given her portions of the income from the estate for her personal use. If she had been given funds from the estate, in any accounting she will have to be debited with the drawings from the estate. If she has overdrawn, she will have to refund. But there can be no presumption that the purchase in the name of the 1st defendant who was not in management of the common property was for the estate. The present action is not one against the estate of the maternal grandfather in the hands of his heirs to account for the surplus funds or against her for refund of excess drawings. Having examined the evidence, oral and documentary, we find ourselves in entire agreement with the learned Subordinate Judge that the acquisition of the 2nd schedule property was for the exclusive benefit of the 1st defendant and not as representing the co-heirs.

In the result the Letters Patent Appeal is allowed and the decree and judgment of the trial Court in regard to the 2nd schedule property are restored. The parties will bear their respective costs in this appeal.

V.M.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. SRINIVASAN.

Union of India, represented through its General Manager, North Eastern Railway ... *Petitioner**

v.

M/s. G. Swaminatha Mudaliar Sons, through its Mg. Partner G. Maria Joseph ... *Respondent.*

Railways Act (IX of 1890), section 80—Scope—Goods consigned at Madurai to a place on North Eastern railway—Loss in transit—Suit for damages against Union of India by its General Manager, North Eastern Railway filed at Madurai—Maintainability.

Section 80 of the Railways Act, though it uses the expression 'may' has the effect of mandatory direction. A suitor is permitted by that section to file a suit for compensation against any one of the railway administrations (1) which receives the goods in transit (2) which ultimately delivered the goods and (3) the railway during the transit upon which damages to the goods actually occurred. There is no other category of railway which can be sued. If it is the intention of the Act that because the Union of India owns all the railways a suit can be laid against the Union of India without anything more, section 80 would for the most part be rendered nugatory. It is in order not only to assist any suit or for compensation but also afford protection to the railways that this section has been enacted. It is clear therefore that a plaintiff must sue one or more of the particular railway administrations in an action under section 80 and cannot broadly file a suit against the Union of India.

Where therefore there is loss in transit of goods consiged at Madurai to a place on the North Eastern Railway, a suit for damages against the Union of India

* C.R.P. No. 608 of 1968. 28th April, 1969.

represented by the General Manager, North Eastern Railway, would obviously be in terms of section 80 of the Railways Act and it should be instituted at the place where the Court has jurisdiction over that railway. The Court at Madurai will therefore have no jurisdiction to entertain such a suit.

Narayanaswami v. *Union of India*, (1959) 2 M.L.J. 479, held no longer good law in view of *Jetmul Bhojraj* v. *D.H. Railway*, (1963) 1 S.C.J. 505.

Jagannath v. *Union of India*, A.I.R. 1966 Cal. 540 and *Prahlad Rai* v. *Union of India*, A.I.R. 1967 All. 530, Relied on.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the decree of the District Munsif Court of Madurai Town, in S.C. No. 1870 of 1966.

K.C. Jacob and *S.K.L. Ratan*, for Petitioner.

Manicka K. Ramalingam, for Respondent.

The Court made the following

ORDER.—The respondent filed the suit against the Union of India, represented by the General Manager, North Eastern Railway claiming damages in respect of loss of goods in transit. The goods were consigned at Madurai station to a place on the North Eastern Railway. The suit as would be noticed was laid against the Union of India, through its General Manager, North Eastern Railway. The question whether the suit was maintainable under section 80 of the Railway's Act, was raised as an issue and it appears to have been contended by the North Eastern Railway that under section 80 of the Railways Act, the suit was not properly laid. The Court below thought that since in the course of the correspondence the Southern Railway Administration had given some reply to the claimant, the respondent, apparently on behalf of the North Eastern railway, the suit was properly laid against the defendant.

In this revision petition, the railway contends that since the Southern Railway is not a party to the suit, the Madurai Court has no jurisdiction to entertain the suit and that is the only question that requires to be examined.

It seems to me that the contention of the railway is well-founded. Section 80 of the Railways Act deals with suits for compensation ; such a suit for compensation for loss of the life of, or personal injury to, a passenger or for loss, destruction, damage, deterioration or non-delivery of animals or goods may be instituted in the manner provided for in that section. Broadly stated it is to the effect that the suit may be instituted against the railway where the goods were delivered for carriage or against the railway administration on whose railway the destination station lies, or against that railway administration on whose railway the loss, injury, destruction or deterioration occurred. It further says that the suit may be instituted in a Court having jurisdiction over the place from which the passenger obtained his pass or purchased his ticket or the animals or goods were delivered for carriage as the case may be or over the place in which the destination lies or the loss, injury, destruction, damage or deterioration occurred. The first part of the section obviously provides that any one of the several administrations over which the goods travelled can be sued, and the second part provides that the Court, having jurisdiction over the place at which the particular incident happened, such as, where the ticket was purchased, or the goods were delivered or where the damage had occurred, would be the proper Court to entertain the action. In the present case the plaintiff framed his suit so as to make it appear that the North Eastern Railway Administration is the administration that is liable to pay compensation for the damage caused to the goods. It is obvious that the Court at Madurai can have no territorial jurisdiction over the place where, even according to the plaint allegation, the damage to the goods occurred. Learned counsel appearing for the respondent-plaintiff in the suit urges that since the Union of India owns all the railway administrations including the Southern railway, despite the limited scope of the cause title namely Union of India represented through its General Manager, North-Eastern Railway, the suit can be laid in any Court having jurisdiction over the area where the Southern Railway operates. In support of this

argument the decision of *Ramco Textiles* v. *Union of India*[1], was referred to. The learned Judge who decided the case held that the suit relating to a railway owned and administered by the Central Government lay against the Government irrespective of the identity of the Railway Administration whose default gave rise to the cause of action. The suit in that case was laid at Cannanore against the Union of India as owner of the North Eastern Railway, represented by the General Manager, North Eastern Railway, Gorakhpur, and it was dismissed by the Court in which it was laid on the ground that it had no territorial jurisdiction. Apparently, the Union of India did not enter appearance in the revision petition before the High Court. The matter was virtually decided *ex parte* though some counsel rendered assistance to the Court as *amicus curiae*. The learned Judge thought that having regard to section 79, Civil Procedure Code, since the person sued was the Central Government and the Central Government was properly described as the Union of India, in the plaint, the further words in the cause title describing the Union of India as " the owner of the North Eastern Railway represented by the General Manager, North Eastern Railway" were a mere superfluity which could be ignored. In effect, the learned Judge thought that the suit was against the Union of India *simpliciter* and that if that be so, the suit could be laid, even at Cannanore. With respect I do not find any considerable discussion as to the scope of section 80 of the Railways Act. The learned Judge has referred to the decision of this Court in *Narayanasami* v. *Union of India*[2], in support of this view.

Turning to the Madras decision, a Bench of this Court held that the requirements of section 77 would be adequately complied with if the notice under that section was sent to the General Manager of any one of the Government Railways concerned in the route over which through traffic passed. That is to say, even though the actual action might be against another railway which dealt with the goods notice to any one of the railway administrations covering the route might be sufficient compliance with section 77. This decision to my mind does not appear to lay down the correct law for in *Jetmul Bhojraj* v. *D.H. Railway*[3], their Lordships of the Supreme Court observed in paragraph 22 of the Report :

"Upon the language of section 77, it would appear that a notice thereunder must be given to every Railway Administration against whom a suit is eventually filed."

Clearly no person can give a notice to one Railway Administration and file a suit against a totally different Railway Administration and maintain that there has been sufficient compliance with section 77 of the Act. In so far as the learned Judge of the Kerala High Court relied upon a Bench decision of this Court in support of the view that he took, it seems to me that the foundation has been destroyed by the decision of the Supreme Court.

Section 80 though it uses the expression ' may ' has to my mind the effect of the mandatory direction. A suitor is permitted by that section to file a suit for compensation against any one of the Railway Administrations (1) which receives the goods in transit (2) which ultimately delivered the goods and (3) the railway during the transit upon which damages to the goods actually occurred. There is no other category of railway administration which can broadly be sued. If it is the intention of the Act that because the Union of India owns all the railways a suit can be laid against the Union of India without anything more, section 80 would for the most part be rendered nugatory. It is in order not only to assist any suitor for compensation but also afford protection to the railways that this section has been enacted. It is clear therefore that a plaintiff must sue one or more of the particular Railway Administrations in an action under section 80 and cannot broadly file a suit against the Union of India.

This view has also been taken by the Calcutta High Court in *Jagannath Chetran* v. *Union of India*[4], and also by the Allahabad High Court in *Prahlad Rai and Sons* v. *Union of India*[5].

1. A.I.R. 1960 Ker. 257.
2. I.L.R. (1959) Mad. 939: (1959) 2 M.L.J. 479: A.I.R. 1960 Mad. 58
3. (1963) 1 S.C.J. 505: (1963) 1 An.W.R. S.C. 89: (1963) 1 M.L.J. (S.C.) 89: (1963) 2 S.C.R. 832: A.I.R. 1962 S.C. 1879.
4. A.I.R. 1966 Cal. 540.
5. A.I.R. 1967 All. 530.

If therefore the suit was against the North Eastern Railway represented by the Union of India it is obvious it will be in terms of section 80 of the Railways Act; and it should be instituted at the place where the Court has jurisdiction over that railway.

The question of jurisdiction under section 20 of the Civil Procedure Code would also be in conformity with it. I am satisfied therefore that the contention of the petitioner that the Madurai Court has no jurisdiction is sound.

Learned counsel appearing for the respondent urges that he should be permitted to take back the plaint and present it in the proper Court. The judgment and decree of the lower Court are set aside and the plaintiff will be permitted to take the plaint back and deal with it in such manner as may be open to him. There will be no order as to costs in this petition.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P.S. KAILASAM.

Public Prosecutor ... *Appellant**

v.

Mayakrishnan ... *Respondent.*

Prevention of Food Adulteration Act (XXXVI of 1954), sections 2 (i) (a), 7 (1) and 16 (1)—Possession of adulterated ground-nut oil in grocery shop for sale—Acquittal on the ground that there was no proof that it was intended for human consumption—Legality.

The facts proved in the instant case are that the accused was running a grocery shop that he was selling groundnut oil, that he was in possession of adulterated groundnut oil in a tin and that the Food Inspector purchased it from him. The acquittal by the trial Court is on the ground that the prosecution had not proved that the groundnut oil was kept by the accused as food intended for human consumption. This cannot be accepted as correct. Groundnut oil is admittedly an article of food and it was being sold in a grocery shop. On these facts, there cannot be any doubt that it was intended to be sold for human consumption.

Held no question of law arose and the reference was unnecessary. *Held* also that there was no conflict between the two decisions *Public Prosecutor* v. *Palaniswami* I.L.R. (1964) 2 Mad. 972 : A.I.R. 1965 Mad. 98 and *Manickam Chettiar In re*, (1966) L.W. (Crl.) 22.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) of an offence under section 7 read with section 2 (1) (a) and (l) punishable under section 16 (1) of the Prevention of Food Adulteration Act, by the Additional First Class Magistrate, Virudhunagar in C. C. No. 382 of 1966 on his file.

The Public Prosecutor, for Appellant.

J. S. Athanasius, for Respondent.

This appeal First came on before K. N. Mudaliyar, J.

The Court made the following

ORDER.—On a consideration of the entire facts and findings in this case, and also the decision of Ramakrishnan, J., in *Public Prosecutor* v. *Palaniswami*[1], and the decision of Ramamurti, J., in *Manickam Chettiar* In re[2], I am of the view that this case may be posted before a Division Bench of two Judges, in view of the substantial conflict of opinion between Ramkrishnan, J., and Ramamurti, J., in regard to the interpretation of sections 2 (13) and section 7 of the prevention of Food Adulteration Act. The papers may be placed before my Lord, the Chief Justice.

*Crl.A. No. 415 of 1967. 2nd April, 1969.

1. I.L.R. (1964) 2 Mad. 972 : A.I.R. 1965 Mad 98.
2. (1966) L.W. (Crl.) 22.

In pursuance of the said order, this Appeal came on for hearing on for hearing before the Division Bench.

The following Judgments were delivered

Kailasam, J.—This appeal is filed by the State of Madras for setting aside the order of acquittal of the respondent passed by Additional first Class Magistrate, Virudhunagar, in C. C. No. 382 of 1966. The respondent was tried for an offence under section 7 read with section 2 (*i*) (*a*) and (*l*) punishable under section 16 (1) of the prevention of Food Adulteration Act for his having been in possession of adulterated groundnut oil for sale.

According to the complainant, the Food Inspector of Virudhunagar Municipality under the powers conferred on him to take samples of food articles for analysis under the Prevention of Food Adulteration Act, went to the grocery shop of the respondent in which he was selling groundnut oil in Door No. 51. Sevathipuram, II Street in Muthurampatti within Virudhunagar Municipal limits. At about 8-30 A. M. on 22nd November, 1965, he went to the respondent's shop. The respondent was in possession of groundnut oil in a tin which contained 4 or 5 litres of groundnut oil. The Food Inspector purchased 375 ml. from the respondent for Rs. 1.50 on a receipt Exhibit P-1 signed by the respondent in the presence of witnesses Karuppiah and Dharmar who attested Exhibit P-1. The Food Inspector divided the oil into 3 equal parts, poured them in 3 empty, clean and dry bottles and sealed and labelled them. He also prepared a notice and served a copy of it on the respondent and got his signature on it. He gave one of the sample bottles to the respondent and got his acknowledgment endorsed in Exhibit P-1. He sent a sample to the Public Analyst, Guindy. He received a report of the Public Analyst which disclosed that the groundnut oil contained free fatty acids in excess of the permitted limit to the extent of 73 per cent.

Karuppiah (P. W. 2) who was the attesting witness was examined by the prosecution to prove his attestation in Exhibit P. 1. But he turned hostile and in reply to question by the Assistant Public Prosecutor, in cross-examination he admitted that he signed Exhibit P-1 after he read the same and that the contents of Exhibit P-1 are true. There can be no difficulty in coming to the conclusion that this witness was gained over. In cross-examination after having been treated as hostile, he stated that the contents in Exhibit P-1 are true. The defence of the respondent was that he was not doing oil business, that his shop is situate in his house itself and that in spite of his refusal to sell groundnut oil which he had purchased for lighting the lamp in his house, the Food Inspector purchased the same by compulsion. The Analyst's report Exhibit P-5 shows that the sample contained 6.2 per cent as against 3 per cent of Free Fatty Acids as permitted by clause A-17-03 in Appendix B to the Prevention of Food Adulteration Rules, 1955.

The Additional First Class Magistrate Virudhnugar found that P. W. 1's evidence and Exhibit P-1 proved that the sale of groundnut oil was voluntary by the respondent. He rejected the contention of the defence that there was no sale of groundnut oil. The trial Court, on a consideration of the question whether the respondent had sold edible oil for consumption by the public, observed that P. W. 1 has not deposed that the respondent had groundnut oil in his possession intended for sale as food for human consumption and that Exhibit P-1 does not contain that P. W. 1 bought the groundnut oil intended for human consumption as food from the respondent. Relying on a decision of this Court in *Manickam Chettiar*, In re[1], the trial Court held that the prosecution had not proved beyond all reasonable doubt that the oil which the respondent had sold to P. W. 1 was kept by the respondent as food intended for human consumption. According to the trial Court, groundnut oil can be used for burning light and can also be used for soap manufacture. Giving the benefit of doubt, the trial Court acquitted the respondent.

On the facts, the trial Court accepted the evidence of P. W. 1. We have also no difficulty in accepting the testimony of P. W. 1 that the respondent was running a grocery shop in which he was selling groundnut oil and that at 8-30 A. M. on 22nd

1. (1966) L.W. (Cri) 22.

November, 1966, he went to the shop of the respondent who was in possession of the groundnut oil and purchased 375 ml. from the respondent for Rs. 1.50 after getting a receipt signed by him. The facts thus proved are that the respondent was running a grocery shop, that he was selling groundnut, oil, that he was in possession of groundnut oil in a tin which contained 4 or 5 litres of groundnut oil and that the Food Inspector purchased it from him. We have also considered the suggestion made in the cross-examination that the respondent purchased the oil for use in his house for lighting lamps and we have no hesitation in rejecting it. We are in agreement with the finding of the trial Court that the respondent did sell groundnut oil and the sale was voluntary. The acquittal is on the ground that the prosecution has not proved beyond all reasonable doubt that the groundnut oil which the respondent had sold to P. W. 1 was kept by the respondent as food intended for human consumption. The evidence is that the respondent was running a grocery shop in which he was selling groundnut oil. Groundnut oil is admittedly an article of food and it was being sold in a grocery shop. On the facts, there cannot be any doubt that the article of food, namely, the groundnut oil, was intended to be sold for human consumption. We are unable to accept the view of the trial Court that the prosecution has not proved that the respondent kept groundnut oil as food intended for human consumption. In the context of the respondent having it in his grocery shop and for sale, we have no hesitation in coming to the conclusion that the respondent was keeping the groundnut oil as an article of food intended for human consumption. On this finding of fact, no question of law arises.

This matter is placed before us on a reference by a single Judge of this Court. We are at a disadvantage as we do not know the conclusion arrived at by the learned Judge on the facts of the case. If the learned Judge had accepted the prosecution case, in our view, no question of law would arise. In the absence of findings on fact we are unable to deal with any question of law. The points on which there is conflict of opinion between two learned single Judge's of this Court is also not stated.

Ramakrishnan, J.—I agree with the judgment just now pronounced by my learned brother (Kailasam, J) After a consideration of the two decisions, one that of myself reported in *Public Prosecutor* v. *Palaniswami*[1], and the other that of Ramamurthi, J., in *Manickam Chettiar*, In re[2] wish to state that there was no conflict between the two decisions. They dealt with entirely different points. In the decision in *Public Prosecutor* v. *Palaniswami*[1], the article sold was asafoetida which is an article of food for which standards of quality are specified in Appendix B of the prevention of Food Adulteration Act read with rule 5 of the Prevention of Food Adulteration Rules. The plea of the accused was that though he had sold the asafoetida from the provision shop, it was understood as between him and the buyer that the asafoetida should be used for cattle and not for human consumption. The decision held that it was not open to the accused to raise such a plea because the crux of the offence does not lie in the use to which the buyer may put an article, but whether intrinsically the article sold or exposed for sale is one used for human consumption or not. It was sold to the Food Inspector from a shop where articles of food were sold. These facts were not denied. In the decision in *Manickam Chettiar*, In re[2] the facts were different. Ramamurti, J., at page 27 of this decision observed that it was a case in which on the evidence, and on the probabilities the accused should be given the benefit of doubt, in the sense, that the prosecution has not proved beyond reasonable doubt that the oil tins in question were kept or stored for sale for human consumption and not for being taken to and consumed at the soap factory of the owner. In other words, on the facts, the learned Judge held that the oil in question was not stored for sale at the premises but was stored only for the consumption of the owner of the shop. In such a context, it was held by the learned Judge that the sale to the Food Inspector of a sample of the oil would not attract the penalty under the Act even if the oil was found to be adulterated. The learned Judge also invoked the provisions of section 10 which defines the powers of

1. I.L.R. (1964) 2 Mad. 972 : A.I.R. 1965 Mad. 98.
2. (1966) L.W. (Crl.) 22.

the Food Inspector. That section says that the person from whom the sample is taken must be selling the goods or storing the goods, sale and storage being interpreted in terms of the definitions under the Act. In other words, ordinarily a Food Inspector would not take a sample of an article of food in exercise of the powers under the section unless he has reason to believe that the person from whom he takes the sample is selling the article for human consumption, use and the like. He would not take a sample from a person who has stored the article for his own consumption, for a festival and the like. Therefore, the very fact that the Food Inspector makes an inspection and selects a sample for analysis pre-supposes that the article is being exhibited for sale and is also an article of food within the definition of section 2 of the Act. These provisions are interlinked and if while dealing with the facts of the case, all these inter-linked provisions namely, the definition of sale, the definition of article of food and the powers of the Food Inspector are all taken into account, there will be little or no difficulty in applying the provisions of the Act.

The difficulty which arose in the present case primarily turned on the issue of fact whether the article was seized from the provision shop or the house of the accused. The evidence was that it was seized from the provision shop where articles of food, provisions and the like were kept and sold. It was that circumstance which made the Food Inspector enter the shop and seize the sample of oil. Therefore, the vital ingredients for the purpose of the penalty namely, sale of the article by the dealer from a place where ordinarily food articles are sold and the article itself being an article of food which ordinarily enters into preparation of other food articles and thirdly, the requirement, of a sale for analysis to the Food Inspector were all satisfied.

In the above circumstances, there is every reason for coming to the conclusion that the penalty under the Act was incurred by the respondent for the sale of an adulterated article of food within the several definitions under the Act. No doubt, Ramamurti, J., has made certain categorical observations in the course of his judgment *viz.*, that the person from whom the sample is taken for analysis, must either be selling for human consumption, or must have stored or kept the article of food for sale for human consumption. He has also stated that a sale for analysis simpliciter, without anything more is not sufficient to constitute an offence under the Act. But it is not necessary for us to express an opinion as to how far these views are justified because the present case can be dealt with on the short basis of facts mentioned above and on the applicability of the sections of the law mentioned above to those facts. What we wish to stress, however, is that in applying the observations of the learned Judge, the main provisions of the sections mentioned above to which we have adverted to, should be clearly borne in mind. They do not, for example lay down any restriction about the sale to a Food Inspector. But the restriction, if necessary, has to be inferred from section 10 which in turn depends upon the definition of " sale and storage ". These sections have to be construed and applied to the facts of a given case without adopting any general principle that the sale should be hedged in particular conditions or restrictions beyond what the definition of the Act itself lays down.

So far as the punishment is concerned, the respondent is fined Rs. 250 in default to undergo simple imprisonment for six weeks. Time for payment three weeks.

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

Kandavelu Mudaliar ... *Petitioner**.

v.

Rajammal ... *Respondent*.

Criminal Procedure Code (V of 1898), section 488—Claim for maintenance to illegitimate child—Nature of proof required.

Under section 134 of the Evidence Act no particular number of witnesses shall in any case be required for the proof of any fact. It is true that when a woman claims maintenance to her illegitimate child from another, it is not safe to act solely on her evidence charging the latter with the paternity of her child. But it is not reasonable to expect corroboration in the shape of evidence of other witnesses. It is however legitimate to expect corroboration from the surrounding circumstances. Ultimately, it is a question for the trial Court to find out whether the evidence of the woman could on the facts and circumstances of the case, be believed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Chief Presidency Magistate, Egmore, Madras passed in M. C. No. 2379 of 1966 dated 16th February, 1967.

T. N. Anandanayaki, for Petitioner.

R. Veeramani, for the Public Prosecutor, for State.

The Court made the following

ORDER.—Petitioner, Kandavelu Mudaliar seeks to revise the order of the Chief Presidency Magistrate, Egmore, Madras directing him to pay a sum of Rs. 20 per month to his illegitimate child born through the respondent. The petitioner employed as a charge hand in Switch Gear department in Larson and Toubro Limited, Madras, joined duty in Madras on 2nd January, 1965 after he was transferred from Bombay and was living with his father. The respondent, Rajammal, was working as a maid servant, in the house of the petitioner's father, Kalyanasundara Mudaliar for three years till a year prior to this case. Both the petitioner and the respondent became intimate and this resulted in the respondent Rajammal becoming pregnant. The respondent, Rajammal complained about it to the petitioner and he gave her some pills to abort the child, but the attempt was not successful. After the birth of the child, the petitioner refused to have anything to do with the respondent, Rajammal.

Rajammal examined herself and one Govindammal in support of her case. The petitioner, Kandavelu Mudaliar examined himself alone on his side. The learned Chief Presidency Magistrate did not accept the evidence of Govindammal who claims to have seen both the petitioner and the respondent together at Cinema theatre. But he believed the evidence of Rajammal and awarded maintenance at the rate of Rs. 20 per month to the child.

Thirumathi T. N. Anandanayaki appearing for the petitioner relied on the decision in *Rev. C. R. Vedantachari* v. *Marie*[1], where Wallace, J., has observed that in the case under section 488, Criminal Procedure Code, where the question at issue is whether a certain man was the father of a certain child, it is *prima facie* improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity and that her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own word without some independent corroboration. The learned Judge went into the facts of that case in the revision and allowed it. If the decision proceeds on the facts of the particular case, no one could complain about it. It is possible that

* Crl. R.C. No. 550 of 1967 and Crl. R. C. No. 543 of 1967. 6th February, 1969.

1. A.I.R. 1926 Mad 1130.

the learned Judge was not inclined to believe that the Reverend Vedantachari would have got an illegitimate child through the respondent, Marie in that case. There is no reference to section 134 of the Evidence Act in the decision. Under section 134 of the Evidence Act, no particular number of witnesses shall in any case be required for the proof of any fact. It is true that it is not safe to act solely on the evidence of a woman who charges another with the paternity of her child. But it is not reasonable to expect corroboration in the shape of evidence of other witnesses. It is however legitimate to expect corroboration from the surrounding circumstances. Ultimately, it is a question for the trial Court to find out whether the evidence of the woman could on the facts and circumstances of the case, be believed.

Thirumathi T. N. Anandanayaki took me through the evidence of Rajammal and Kandavelu Mudaliar. The evidence of Rajammal rings true. Kandavelu Mudaliar went to the extent of stating that there was no front room in his father's house. It is significant to note that no suggestion was made to Rajammal that there was no front room in the house of the petitioner's father in spite of her evidence that it was in the front room she and Kandavelu Mudaliar used to cohabit. The petitioner, Kandavelu Mudaliar is aged 28 years and he was married only subsequently on 2nd February, 1966. He claims to have given a complaint of theft against Rajammal, but he made no attempt to summon it and prove it. It is unnecessary in a revision case to deal elaborately with the oral evidence. There are sufficient surrounding circumstances which clearly corroborate the evidence of P.W. 1. I see no error of law or principle in the appreciation of the evidence of Rajammal by the learned Chief Presidency Magistrate. I see no ground to interfere with the finding of fact given by the learned Chief Presidency Magistrate that the child of Rajammal is the illegitimate child of Kandavelu Mudaliar. No objection could be taken to the quantum of maintenance *viz.*, Rs. 20 per month having regard to the fact that Kandavelu Mudaliar is earning Rs. 350 per month. I see no ground to interfere with the order of the learned Chief Presidency Magistrate awarding Rs. 20 per month as maintenance to the illegitimate child of the petitioner. The criminal revision petition is dismissed.

V. K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

T.A. Krishnaveni and another ... *Petitioners**

v.

R. Palaniappan Poosari and others ... *Respondents.*

Madras Co-operative Societies Act (LIII of 1961), sections 91, 96, 97 and 119 (2) (p) (iv) and Madras Co-operative Societies Rules (1963), Chapter X, rule 69 (1) and (7)—Application under Rule 69 dismissed—Appeal or revision—All orders under Chapter X of Rules subject to appeal under section 96—Rule 69 (7) beyond rule-making power.

The Tribunal has Jurisdiction to entertain the appeal and the Registrar does not have the power to revise under section 97 of the Act. The reference in section 91 of the recovery being ' subject to the rules ' does not mean that any rules made under the provisions of section 119 can have the effect of whittling down the powers conferred on the Tribunal under section 96. Section 96 does not say that the power to entertain appeals against the decisions or orders made under section 91 are subject to any rules made under any of the provisions of the Act. Indeed, even, if any rule were permitted to be made under section 96, they can only relate to the procedure with regard to the entertaining and hearing of appeals and cannot take away the power of appeal given under that section in respect of matters covered by section 91. Similarly rules contemplated under the section 119, can only relate to the

* W.P. No. 4656 of 1968. 23rd April, 1969.

procedure for recovery and cannot relate to appeals which are provided for under section 96. All rules made under an Act should be consistent with the provisions of the Act and advantage cannot be taken of the wide language in which the rule-making power is worded, to contend that such rules can be made even if they are inconsistent with any part of the Act. All the sections of an Act as well as the Rules made under the Act must be read together and interpreted consistently with each other and if this principle of interpretation is kept in mind, there can be no room for the argument that a rule can be made which takes away the power conferred by a section of the Act.

Held, all orders made under chapter X of the Madras Co-operative Societies Rules 1963, would be subject to appeal under section 96 of the Act. That no doubt, might throw a heavy burden on the Tribunal, but that cannot be helped. It is a matter for the Legislature to deal with. Rule 69 (7) should be deemed to be held to be beyond the rule making power conferred on the Government under the provision of section 119. The powers of the Tribunal under section 96 of the Act have not been, and cannot be whittled down in any way.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records connected with the order of the District Judge, Salem, dated 14th November, 1968 in un-numbered C.M.A. No. of 1968 rejecting the appeal filed against the order of the Deputy Registrar and Registrar of District Salem south dated 24th July, 1968 made in C.E.P. No. 3012 of 1966-67 and quash the said order and made therein.

S. Palaniswami and *Kanniah*, for Petitioners.

R. Krishnamurthi, for the Government Pleader for Respondent No. 3.

R. G. Rajan, for Respondent No. 2.

G. K. Selvarajan, for Respondent No. 1.

The Court made the following

ORDER.—This writ petition is concerned with the effect and validity of sub-rule (7) of rule 69 of the Madras Co-operative Societies Rules, 1963. Under section 91 of the Madras Co-operative Societies Act, 1961, the Registrar or any person subordinate to him empowered by the Registrar in that behalf may, subject to the rules and without prejudice to any other mode of recovery provided by or under the Act, recover the various sums specified in clauses (*a*) to (*f*) of that section, together with the interest, if any, due on such sum and the costs of process by the attachment and sale or by sale without attachment of the property of the person against whom such decree, decision, award or order, has been obtained or passed. Under section 119 (2) (p) (*iv*) the Government have power to make rules for the enforcement of the decisions or awards in such proceedings and under clause (*ff*) to prescribe the procedure for the attachment and sale of property under section 91 of the Act. Rules have been made in pursuance of these powers and they are found in Chapter X of the Madras Co-operative Societies Rules, (1963); rules 59 to 83 of those Rules. Rule 69 provides for application to set aside a sale on ground of irregularity or fraud, and corresponds to Order 21, rule 90 of the Code of Civil Procedure. Under section 96 of the Act, any person aggrieved by any decision passed or order made under section 91, may appeal to the Tribunal constituted under section 95 of the Act, which in this case is the District Judge of the district concerned.

In this case the application made by the petitioner under rule 69 was dismissed. The petitioner then filed a revision petition before the Registrar, apparently under sub-rule (7) of rule 69. The Registrar rejected it, holding that he had no revisional jurisdiction in the matter. Thereupon, the petitioner filed an appeal to the Tribunal under section 96 and the Tribunal has rejected it holding that it had no jurisdiction to entertain an appeal in the matter. This writ petition is filed to quash the order of the Tribunal.

It appears to me that the Tribunal has jurisdiction to entertain the appeal and the Registrar does not have the power to revise under section 97 of the Act. The reference in section 91 of the recovery being 'subject to the rules' does not mean that any Rules made under the provisions of section 119 already referred to, can have the effect of whittling down the powers conferred on the Tribunal under section 96. Section 96 does not say that the power to entertain appeals against the decisions or orders made under section 91 are subject to any Rules made under any of the provisions of the Act. Indeed, even if any rule were permitted to be made under section 96, they can only relate to the procedure with regard to the entertaining and hearing of appeals and cannot take away the power of appeal given under that section in respect of matters covered by section 91. Similarly rules contemplated under (the) section can only relate to the procedure of recovery and cannot relate to appeals which are provided for under section 96. All rules made under an Act should be consistent with the provisions of the Act and advantage cannot be taken of the wide language in which the rule-making power is worded, to contend that such rules can be made even if they are inconsistent with any part of the Act. All the sections of an Act as well as the Rules made under the Act must be read together and interpreted consistently with each other and if this principle of interpretation is kept in mind, there can be no room for the argument that a rule can be made which takes away the power conferred by a section of the Act. There have been cases where it has been held that Rules can be made conferring powers on certain Bodies or Tribunals, on the ground that they are intended to carry out the purposes of the Act even though no specific rule-making power permitting such rules being made are found in the Act. But that is different from saying that a rule can be made which takes away the power granted under a section of the Act.

Under Order 21 of the Code of Civil Procedure, only orders passed under certain of the rules in that Order are made appealable. The result of my conclusion in this case would be that all orders made under Chapter X of the Madras Co-operative Societies Rules, 1963, would be subject to appeal under section 96 of the Act. That no doubt, might throw a heavy burden on the Tribunal, but that cannot be helped. It is a matter for the Legislature to deal with. The reference to section 97 in sub-rule (7) of rule 69, seems to have been merely copied from the old Rules made under the Madras Co-operative Societies Act, 1932, under rule 22 (10) (V-*a*) of which an order made under that sub-rule was, subject only to the provisions of section 57 of that Act, final. Section 97 of the present Act corresponds to section 57 of the old Act. But, under the old Act there was no provision for an appeal to the Tribunal. Without bestowing sufficient attention to this aspect, the old rule 22 (10) (*v-a*) has been copied as the present rule 69 (7), merely substituting reference to section 97 of the present Act in place of the reference to section 57 of the old Act. I am satisfied that rule 69 (7) should be deemed to be held to be beyond the rule-making power conferred on the Government under the provisions of section 119 of the Act already referred to. It should, therefore, be held that the powers of the Tribunal under section 96 of the Act have not been and cannot be whittled down in any way. The result of this conclusion is that the Tribunal has got to hear the appeal. Of course, it is open to the respondents to raise whatever relevant contentions are available to them regarding the merits of the appeal, including the question whether the appeal is in time. The decision in this writ petition is only that the Tribunal has jurisdiction to hear the appeal and has therefore a duty to hear it. Ordered accordingly. No order as to costs.

I must thank Mr. Ramanujam, the learned Government Pleader, who was not interested in the matter directly but helped the Court with his arguments as also Mr. R.G. Rajan, who argued the case fairly. It goes without saying that due credit should be given to Mr. Palaniswami who argued the case for the petitioner with considerable ability.

S.V.J. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

Pannalal Ratanlal Suranna ... *Petitioner**

v.

Manakchand Lodha ... *Respondent.*

Tort—Malicious Prosecution—Suit for damages—Forum.

Where the summons in a prosecution on a private complaint by the defendant is served on the plaintiff within the jurisdiction of the Court at Salem and the criminal case was instituted at Pandharkavada in Maharashtra which ended in the discharge of the plaintiff, a suit for damages for alleged malicious prosecution by the plaintiff in the Court at Salem would be competent as the wrong against the plaintiff should be taken to have been partly done at the place where he had been served with the summons, in obedience of which he had to attend the Criminal Court. In that sense the service of summons is part of the wrong done to the plaintiff.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif Court, Salem in O.S. No. 267 of 1967.

N. R. Raghavachariar, for Petitioner.

S. Jagadisan, for Respondent.

The Court made the following

ORDER.—The respondent sued in the Court of the District Munsif, Salem for damages for alleged malicious prosecution by the defendant, who is the petitioner. It is not in dispute that the criminal case was instituted by the defendant at Pandharkavada in Maharashtra, which ended in the discharge of the plaintiff. The Court below sustained its jurisdiction to entertain and proceed with the suit on the ground that the summons in the prosecution was served on the plaintiff within the jurisdiction of that Court. This petition is to revise that order.

It seems to me that the Court below took the right view. The summons is a necessary step among others in a criminal prosecution. It is no doubt true that when a complaint is filed, the Court it is that issues the summons, but it is a necessary consequence of the complaint and forms part of the criminal proceedings. That was the view taken by the Mysore High Court in *Gokaldas* v. *Baldevdas*[1], and I find myself, with respect, in entire agreement with it.

Mr. Raghavachariar strenuously contended that, having regard to the scheme of the Civil Procedure Code, the fasciculus of sections relating to cause of action founded on or connected with immovable property, the next relating to criminal prosecutions and the third with reference to contracts, show that, unless the wrong by way of a malicious prosecution has been done within the jurisdiction of a particular Court, it would have no power to try a suit for damages for such a prosecution. Learned Counsel is right in making that proposition, but only the argument does not properly appreciate that the wrong against the plaintiff should be taken to have been partly done at the place where he had been served with the summons, in obedience to which he had to attend the criminal Court. In that sense the service of summons is part of the wrong done to the plaintiff.

The petition is dismissed, but with no costs.

V.K. ——— *Petition dismissed.*

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* C.R.P. No. 1421 of 1968. 10th March, 1969.

1. A.I.R. 1961 Mys. 188.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

V. Ramaswami Goundar .. *Appellant**

v.

S. T. Murugappa Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 55 and Order 21, Rule 37—Execution of money decree—Means to pay—Arrest of judgment-debtor—Judgment-debtor coming into possession of funds—Duty to account for.

Where it is clear from the evidence that a judgment-debtor in a decree for payment of money, has come into possession of substantial amounts within a short time of the decree and he has not accounted for it properly nor explained how the money has been utilised, it should be assumed that the judgment-debtor has the means to pay and he is intentionally withholding payment to the decree-holder.

Harpal Singh v. *Hira Lal*, A.I.R. 1955 All. 402, Explained.

Appeal against the order of the Court of the Subordinate Judge, Erode, dated 17th July, 1968 and made in E.P. No. 144 of 1967 in O.S. No. 122 of 1964.

P. R. Gokulakrishnan, P. Bhaskaran and *B. Soundarapandian,* for Appellant.

R. Desikan, for Respondents.

The Court delivered the following

JUDGMENT.—The present Civil Miscellaneous Appeal is preferred against an order passed by the Sub-Court, Erode, directing the arrest of the appellant in the execution of the decree in O.S. No. 122 of 1964. The decree that is sought to be executed is for costs decreed in O.S. No. 122 of 1964 as per the judgment and decree dated 23rd February, 1967. That decree was against the two respondents in the execution petition, the appellant Ramaswami, and another Kailasam, who are the defendants in O.S. No. 122 of 1964. The appellant owed a large sum of money, about Rs. 41,500 to the respondents herein, who are bankers. As the appellant Ramaswami alienated his properties, the respondents became apprehensive and obtained an agreement of sale from the appellant dated 18th December, 1962 to sell the house of the appellant to the respondents in discharge of the amounts due to the latter. It is also evidenced by a registered agreement between the parties, dated 27th December, 1962 and the title deeds were also delivered to the respondents. But in January, 1963, the title deeds were handed over to one broker Kailasam on the representation that there was a proposal to sell the property and that the sale proceeds would be paid to the respondents. But in breach of faith, an equitable mortgage was created in favour of a third party for a sum of Rs. 15,000 as if on 6th September, 1962. Thereupon the respondents filed the abovesaid suit O.S. No. 122 of 1964 and obtained a decree for specific performance and this suit was decreed, as observed earlier, on 23rd February, 1967, with costs amounting to Rs. 5,000. The application for arrest was resisted by the appellant. The trial Court found that the appellant had sold one house of his within 3 days after the judgment on 26th February, 1967 for a sum of Rs. 5,000 and the appellant also realised on 16h March, 1967 a sum of Rs. 6,454-15 in execution of a decree (obtained by him) in E.P. No. 198 of 1967 in O.S. No. 470 of 1962. In other words, the appellant had come by within one month after the judgment a sum of Rs. 11,154.15. The appellant is also carrying on a *mundi* business. The trial Court took all these facts into account and ordered arrest.

I have perused the evidence of the appellant and I am satisfied that he has not duly accounted for this large sum of money of Rs. 11,000 which came into his hands within about a month after the decree. He has not produced his accounts. He has not given any satisfactory explanation as to what he has done with the money.

* A.A.O. No. 213 of 1968. 20th December, 1968.

Having regard to the prior course of Court proceedings referred to, there can be no doubt about it that the appellant has in his possession a large amount but would not pay the decree-holders. I see no ground for interference.

Learned Counsel for the appellant drew my attention to a Bench decision of the Allahabad High Court is *Harpal Singh* v. *Hira Lal*[1], in support of his contention that the mere fact that the judgment-debtor was in possession of assets at a particular point of time would not be sufficient, because at the time when he is sought to be arrested, the assets would have been utilised by the judgment-debtor for some other purpose. That decision is distinguishable, as in the present case, I am not satisfied that the judgment-debtor has satisfactorily accounted for as to what he had done with the sum of Rs. 11,000. On the other hand, I am clearly of the view that the money is still with him but yet he would not pay the decreeholders.

The result is, the appeal is dismissed. No costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

Monna Ahamad (*died*) and others .. *Appellants**

v.

Khadeeja Beevi and others .. *Respondents.*

Practice—Execution—Mortgage decree—Proceedings before Sub-Court, Kanyakumari in the erstwhile T. C. State—One decree drawn up as per earlier practice in Court—Executability under Civil Procedure Code which requires a preliminary and final decrees to be drawn.

Civil Procedure Code (*V of* 1908), *Order* 34, *rules* 4 *and* 5—*Mortgage decree—Preliminary and final—Failure to adopt correct procedure—If would bar execution.*

Though the provisions of the Code of Civil Procedure, 1908, and in particular the provisions of Order 34, had been brought into force ever since 1951 in the area now comprised in the Kanayakumari district of Madras State (formerly in Travancore-Cochin State), actually Kanyakumari District was integrated with the Madras State only with effect from 1st November, 1956. Hence where a decree in a mortgage suit was drawn up as one composite decree as per the then practice, it cannot be contended that the decree is not executable. The objection is only technical and so long as the decree in terms enabled the sale of the property the executing Court can bring the property to sale if the amount was not paid by the specified date.

Appeal against the order of the Court of the Subordinate Judge of Padmanabhapuram dated 7th January, 1964 and made in E.P. No. 71 of 1963 in O.S. No. 204 of 1951, District Court, Nagercoil.

S. Padmanabhan, for Appellants.

S. S. Mathivanan, for *T. R. Ramachandran* and *T. R. Venkataraman*, for Respondents 1 to 6.

The Court made the following

ORDER.—This is an appeal of a judgment-debtor against the order of the learned Subordinate Judge of Padmanabhapuram in Kanyakumari District overruling his objection to the execution and allowing execution to proceed. The decree was passed in a mortgage suit by the District Court, Nagercoil, on 24th August, 1954. Actually, Kanyakumari District was integrated with the Madras State only with effect from 1st November, 1956. Though the provisions of the Civil Procedure Code (Act V of 1908) and in particular Order 34 had been

1. A.I.R. 1955 All. 402.

*A.A.O. No. 62 of 1964. 11th October, 1968.

brought into force even from 1951 in the area which then formed part of Travancore-Cochin, the practice which existed before 1951 prevailed, namely, of drawing up only one decree even in a mortgage suit instead of two decrees, one preliminary decree and final decree as contemplated in Order 34. The one decree which was drawn up was to the effect that if the amount mentioned in the decree was not paid before a certain date, the hypotheca would be brought to sale. The objection which was taken before the learned Subordinate Judge was that there should have been two decrees and that the above decree could not be executed straightway by bringing the property to sale. The objection was over-ruled by the learned Subordinate Judge on the ground that the correct procedure of drawing up two decrees has been followed only from 1958. It seems to me that the learned Subordinate Judge was right in over-ruling the objection, which is after all only technical. In fact, it may be said that the form of the decree itself gave jurisdiction to the executing Court to bring the property to sale, if the amount due was not paid before a certain date. This being the only objection persisted in before me on behalf of the appellant by the learned Counsel Sri Padmanabhan and that objection having failed, the appeal is accordingly dismissed, but without costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Kumara Kangaya Gounder .. *Appellant**

v.

Arumugha Goundar and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 32—*Minor—Representation of—Guardian*-ad-litem—*If should necessarily be the natural guardian.*

The rules relating to the appointment of guardian *pendente lite* for a minor defendant are to be found in Order 32 of the Code of Civil Procedure. There is nothing in the said provisions making it mandatory on the Court to appoint the natural guardian, where he expresses his willingness, and not exercise its discretion if it so considers and appoint another person as guardian-*ad-litem* for the suit. The provisions of rule 3 (2) and (7) of Order 32 indicate that in cases where there is already a guardian appointed or declared by competent authority or a natural or *de facto* guardian, notice should be given to them. Their claims to act as the guardian in the suit must be considered and the Court must record the reasons for appointing another person to act as guardian if it considers it necessary in the interests of the minor.

The essential requirements are that the person who is appointed as the guardian must be a major, of sound mind and must have no interest adverse to that of the minor. The rules under Order 32 of the Code clearly contemplate the appointment of a person, other than the natural guardian, also as guardian *ad litem.* When once a guardian *ad litem* has been appointed for a minor defendant and the interest of the minor has been duly looked after in the litigation, mere irregularity in the appointment of the guardian without more, will not render the proceedings nugatory.

Appeal against the decree of the Court of the Subordinate Judge, Erode, dated 9th June, 1964 in Appeal Suit No. 114 of 1962, preferred against the decree of the Court of the District Munsif of Dharapuram in Original Suit No. 37 of 1960.

K. Sarvabhauman and *T. R. Mani,* for Appellant.

S. Mohan, for 1st Respondent.

*S.A. No. 1328 of 1964. 27th September, 1968.

The Court delivered the following

JUDGMENT.—The substantial point in this second appeal is whether the decree in O.S. No. 386 of 1953 on the file of the Sub-Court, Coimbatore is vitiated and a nullity as against the plaintiff for want of proper and effective representation therein of the plaintiff who was a minor during its pendency. The plaintiff who seeks to have the decree against him set aside contends that, when his father as his natural guardian was available and in every way interested in his welfare as his only son, his paternal grandfather was appointed as guardian and the gross negligence of this guardian in the conduct of the suit resulted in a decree being passed against him.

First the relevant facts of the case may be set out briefly. The properties in dispute in this suit belonged to one Palaniswami Goundan. He settled the suit properties on his grand-daughter, the second defendant in the suit and one Muthuswami who had been proposed as her husband, both of them minors, under the settlement deed dated 13th May, 1936, conferring absolute rights in the properties on the second defendant and her proposed husband. The second defendant was represented for the settlement by her mother Valliammal as guardian and the proposed husband Muthuswami was represented by his father Ponnuswami as guardian. Along with the settlement, a maintenance deed came to be executed by the guardians for maintaining the settlor Palaniswami. The marriage of the second defendant with Muthuswami as proposed took place shortly after and the plaintiff is the child born to them on 30th October, 1940. Disputes arose between the two guardians, the plaintiff's paternal grandfather Ponnuswami and the plaintiff's maternal grandmother Valliammal, bringing about estrangement between the second defendant and her husband. The plaintiff's mother, the second defendant, who had a 1/2 share in the properties under the settlement deed, usufrutuarily mortgaged the same to the third defendant in the present suit under the original of Exhibit B-8 on 30th June, 1943 for Rs. 2,000. The family dispute finally got settled in a way and the second defendant and her husband, as the father and mother of the plaintiff, executed the settlement deed Exhibit A-6 on 10th July, 1943 in favour of their son, the present plaintiff. But the settlement deed had to be compulsorily registered. For the purpose of this settlement, the present plaintiff who was a minor then, was represented by his paternal grandfather Ponnuswami as guardian. The first defendant got an assignment of the mortgage above referred to and filed the suit O.S.No. 386 of 1953 for recovery of the mortgage amount against the present second defendant and her minor son, the plaintiff, the settlee under Exhibit A-6. The second defendant remained *ex parte* in that suit and in that mortgage suit the present plaintiff was represented by his paternal grandfather Ponnuswami an guardian *ad litem*. The suit was hotly contested on behalf of the present plaintiff, the main plea in the mortgage suit on behalf of the plaintiff being that the mortgage was a sham and nominal transaction, not supported by consideration and had been ante-dated, having been executed after the present second defendant had parted with the title to the property under the settlement deed Exhibit A-6 in favour of the present plaintiff. The defence in the morgage suit failed in the trial Court and in appeal, and the second appeal therefrom failed at the admission stage itself. It is seen from the records that senior advocates had been engaged on behalf of the present plaintiff at all stages. At the stage of the second appeal, the grandfather Ponnuswami was dead and the father Muthuswami himself preferred the second appeal as guardian *ad litem* of his minor son. And so the suit to set aside the decree.

In this suit for setting aside the mortgage decree by the plaintiff after coming of age, on the substantial issue of fact whether there was gross negligence on the part of the guardian *ad litem* of the plaintiff in the conduct of the suit and the appeal therefrom, the learned District Munsif of Dharapuram in a carefully considered judgment, finds against the plaintiff. He holds that there was no gross negligence on the part of the guardian of the plaintiff in the conduct of the suit and the appeal. This finding has been confirmed by the learned Subordinate Judge in appeal. He remarks that he cannot find anything in the oral evidence adduced in the case to

show as to what facts or documents were omitted to be placed before the Court and as to what acts or omissions on the part of the guardian amounted to gross negligence. He concludes that he was satisfied on the evidence adduced in the case that there was nothing to establish that any prejudice was caused to the appellant by any omission on the part of the guardian *ad litem* appointed in the case. He remarks that the guardian had done everything which he could reasonably be expected to do in the interests of the minor. This issue being a finding of fact, naturally the learned Counsel confined his challenge of the judgments of the Courts below to the question whether the minor plaintiff was properly represented in the mortgage suit.

The objection to the representation put forward by the plaintiff is that when there was available his father, the natural guardian, he should have been appointed and in his presence the paternal grandfather was incomepetent to act as his guardian *ad litem*. It is said that there was no need for the Court to overlook the natural guardian and appoint the paternal grandfather as the guardian. It is urged that the appointment of a proper person as guardian *ad litem* of a minor defendant is imperative and, in the absence of due representation of the minor, the decree does not bind him and cannot be enforced against him. There can be no doubt and it is not questioned that a decree passed against a minor properly represented is binding upon him as much as a decree passed against an adult, and that when there has been proper representation, the minor, to avoid the decree, may show that his guardian was guilty of gross negligence in the conduct of the suit. The question therefore is whether there was proper representation of the minor in the former suit.

The rules relating to the appointment of guardian *pendente lite* for a minor defendant are to be found in Order 32, Civil Procedure Code. Under Order 32, rule 3 (1) any person who is of sound mind and has attained majority may act as his guardian for the suit, provided that his interest is not adverse to that of the minor. Rule 3 (2) which is important in the context of the present contention may be set out :

> " Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be."

Rule 3 (4) requires that an application for the appointment of a guardian taken out by the plaintiff shall set forth in the order of suitability a list of persons who are competent and qualified to act as guardian for the suit for the minor defendant, the Court, for reasons to be recorded, being empowered to exempt the applicant from furnishing such a list. Rule 3 (5) sets out the particulars required in the affidavit in support of the application for appointment of guardian. This sub-rule does indicate that before anybody else is considered, the claims of the guardian appointed or declared by competent authority, the natural guardian or the *de facto* guardian must be considered —see the requirement in rule 3 (5) (*c*) for particulars of names and addresses of persons, if any, who in the event of either the natural or *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardians for the minor in the suit. Rule 3 (7) may also be set out :

> " No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule........"

It is seen from the records that in the mortgage suit the plaintiff therein, while applying for the appointment of a guardian for the minor, proposed the minor's father Muthuswami and his paternal grandfather Ponnuswami for the guardianship. Both the proposed guardians expressed their willingness to act as guardian and thereupon the Court appointed Ponnuswami, that is the paternal grandfather, as guardian observing that "Ponnuswami *alias* Subbaraya Goundan is willing to be guardian and is appointed guardian as he is already acting guardian." One must here bear in mind that Ponnuswami, the paternal grandfather, has been shown as the guardian of the minor in the settlement deed Exhibit A-6. The father of the plaintiff in the present case in his evidence has stated that for the registration of the settlement deed Exhibit A-6, (it was not registered on its execution and it was got compulsorily registered), though he was present, his father conducted the whole proceedings and that he and his wife, *viz.*, the other defendant in the mortgage suit, recognised Ponnuswami as the guardian of his son in the settlement deed Exhibit A-6. He went to the extent of stating that till his death he continued to be the guardian. It is not contended that the procedure prescribed for the appointment of a guardian under Order 32, Civil Procedure Code, was not followed in this case. I find nothing in Order 32 making it mandatory on the Court to appoint the natural guardian where he expressed his willingness to be appointed as guardian *ad litem*, and not exercise its discretion if it so considers and appoint another person as guardian *ad litem* for the suit. It is not the case for the plaintiff that anyone has been appointed or declared as guardian by competent authority for him when he was a minor, to compel the Court to appoint such person as guardian *ad litem*, unless the Court considered that it was for the minor's welfare that another person should be appointed. Then the Court is enjoined to record its reasons. Rule 3 (7) of Order 32, Civil Procedure Code, provides for notice of the application to be given to the father or other natural guardian of the minor where there is no guardian appointed or declared by Court. In this case notice went both to the father, the natural guardain and to the paternal grandfather and both expressed willingness. The records do not show any claim being pressed by the father against the grandfather or any objection being urged against the appointment of the grandfather as guardian *ad litem*. The Court has given reason for its choice. The circumstances of the case show that there would not have been any objection and it looks as if the father gave place for the grandfather The essential requirement is that the person who is appointed as the guardian must be (1) a person of sound mind, (2) a major, and (3) he must have no interest adverse to that of the minor in the matters in controversy. The Courts below find that no adverse interest has been made out in this case ; and the trial Court has even indicated why the paternal grandfather was appointed guardian *ad litem*. The settlement deed by the father and mother was put in issue in that case as having preceded the mortgage sued upon, and Ponnuswami the paternal grandfather who was shown as the guardian of the minor by both father and mother in the settlement deed was chosen to represent the minor. It is one thing if a minor defendant is not represented at all, or a person appointed guardian *ad litem* whose interests were adverse to the minor. If a minor is not properly represented in the suit, he can contend that he cannot be considered to have been a party to the suit. But that is not the position here.

Learned Counsel for the appellant referred to *Jiban Krishna* v. *Sailendra Nath*[1]. But this case has absolutely no relevance to the matter under consideration now. That is a case under the Guardian and Wards Act and with reference to that Act it was there pointed out that the appointment of a person as guardian other than a natural guardian, under section 7 (1) of the Guardian and Wards Act, implied under section 7 (2) of the Act, the removal of the natural guardian and that such a removal under section 7 (2) resulted in a permanent cessation of his powers under section 41. Having regard to the provisions of the Guardian and Wards Act it was said that the appointment of a guardian by Court operated as a supersession of the natural or *de facto* guardian of a minor. Such a result does not follow on the appointment of a guardian *ad litem* for a minor defendant by the Court under the provisions of the

1. A.I.R. 1946 Cal. 272.

Civil Procedure Code. The rules under Order 32, Civil Procedure Code, clearly contemplate the appointment of a person other than the natural guardian also as guardian *ad litem*. Order 32, rule 3 (7) is very clear on this point. It only provides that no order shall be made on any application for the appointment of a guardian *ad litem* except upon notice to the guardian appointed and declared by Court and where there is no such guardian upon notice to the father or other natural guardian of minor. No doubt the father would have a preferential right when there is no guardian appointed or declared by competent authority. Objections have to be heard which may be urged on behalf of any person served with notice under the sub-rule 3 (7) of Order 32, Civil Procedure Code, and reasons have to be given if a preferential claim is overruled for another. But it does not follow, that every irregularity in the appointment without more will vitiate the appointment.

A reference to *Kalachand Basak* v. *Amulyadhan Banerji*[1], would show that appointment of a person as guardian *ad litem* in the presence of the natural guardian does not vitiate the representation of the minor in the proceedings. In that case in an earlier litigation the defendant in that suit died leaving his wife and three infant children. The attorney for the opposite party intimated the widow that she must get herself appointed as guardian *ad litem* of her minor sons and that otherwise he would get an officer of the Court appointed as guardian. For the wife intimation was sent that she was in mourning on account of the then recent bereavement and that the matter may stand over for a fortnight. But the defendant in the latter suit was appointed guardian *ad litem* after the Court was satisfied that he had no interest adverse to the minors. When the defendant wanted instructions from the widow, she intimated that she was herself willing to act as guardian and that the defendant could acquaint the Court of the fact. The defendant did inform the Court of the widow's willingness; but the widow took no further steps to substitute herself as a guardian *ad litem*, and Panckridge, J., in the circumstances, remarked that he cannot see anything irregular in the appointment.

If a guardian an *ad litem* has been appointed for a minor defendant and the minor's interests have been duly looked after in the litigation, mere irregularities in the appointment of the guardian cannot render the decree nugatory against the minor. The minor to avoid the decree must further prove that he was not effectively represented in the suit and that he was prejudiced by the failure of the guardian to take pleas that could have been validly raised on his behalf. Law insists that the minor's interests in the litigation should be taken care of and the minor represented in the litigation by an adult whose interests are not adverse to that of the minor. The minor's interests in the litigation should not be neglected or prejudiced, and Courts have to be jealous in observing the requirements of the law in this regard in letter and spirit. All the same when it is found that the guardian who had been acting for the minor in the suit had not let down the interests of the minor and when the minor was in no way prejudiced, it is immaterial if some irregularity in the appointment is found. If the purpose for which a guardian *ad litem* is appointed —to put forward pleas properly available for the minor in the case and protect his interests in the litigation by necessary representation—has been achieved, the minor cannot later, by another guardian or on becoming a major avoid the decree if it is against him, on the ground of some irregularity in the procedure adopted for appointing the guardian. Here no procedural irregularity as such is alleged, but it is said that the father should have been appointed and not the grandfather. Even ignoring the fact that a reason has been given for the choice of the grandfather, on the findings of the Courts below, there has been effective representation of the minor in the suit and there has been no omission on the part of the guardian that has prejudiced the interests of the minor in the present suit. In *Rarichan* v. *Manakkal Raman*[2], while a contention was urged that a guardian appointed by a competent authority under the Guardian and Wards Act had been improperly superseded and a Court guardian appointed without recording proper reasons under Order 32, rule 4, clause (2), it was observed (at page 519):

1. (1934) I.L.R. 61 Cal. 227. 2. (1923) 44 M.L.J. 515.

"Now in the first place as I have already said it is not very clear that he was so appointed, (appointed by competent authority) plaintiff's own case being that he was not so appointed. But even if we take it that he had been so appointed the failure to record reasons under rule 4, clause (2), is only an irregularity in my opinion and will not by itself vitiate the decree if the minor is in fact properly represented by a guardian appointed by Court."

It follows that the view of the Courts below that the plaintiff was properly represented in the suit O.S. No. 386 of 1953 on the file of Sub-Court, Coimbatore is correct.

In the result, the second appeal fails and is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE A. ALAGIRISWAMI.

Commissioner of Income-tax, Madras ... *Applicant**

v.

K. S. Imam Saheb, Kulitalai ... *Respondent.*

Income-tax Act (XI of 1922), sections 2 (1) (a) and 4 (3) (viii)—Agricultural income—Nexus between income, land and agricultural operations—Land to be the immediate source of income—Interest in immovable property and interest in land—Distinction —Assessee, a dealer in coconuts—Enjoyment of coconuts for a period—Land, not the subject of lease—To deliver possession of trees at the end of the stipulated period—Income if agricultural income entitled to exemption.

The assessee was a dealer in coconuts and also took leases (the transactions have been so described) of coconut thopes from different parties. Under a third category of transaction, the assessee paid a fixed annual sum and was allowed to enjoy the fruits of the coconut trees for a stipulated period ranging from 1 to 3 years or even longer. Whether the term ran continuously is not clear from the record. In a few cases there was a stipulation that these leases did not include the land. At the end of the term the assessee should deliver possession of the trees to the lessors. The typical recital is; "as this sum...has been received by me in the manner mentioned above, you shall pluck and take the yield of the coconut in the aforesaid thope, enjoy the same and deliver possession of the grove to me at the expiry of the lease.........The ground land is not subject to the lease". In the other cases, it is doubtful whether the land was included in or excluded from their scope. The Tribunal in appeal held the income was agricultural income exempt from taxation under the Act. Hence the reference at the instance of the Revenue.

Held that, the income was not exempt under section 4 (3) (*viii*) as agricultural income.

Having regard to the definition of 'agricultural income' in section 2 (1) (*a*) of the Act, an income to be agricultural income should satisfy that it is derived from land, and the land in used for agricultural purposes. To put it differently, there should be a nexus between income, land and agricultural operations, by which is meant something done to the land by human or mechanical agency to produce out of the land any crop, trees, plantation or other produce or product. The immediate source of income must be land of the description or character mentioned in the definition.

The contention is that if the transaction is regarded as a lease of immovable property for agricultural purposes, inasmuch as thereby an interest in immoveable property is created, it should follow that the income is from land used for agricultural purposes. But there is a distinction between an interest in immoveable property and an interest in land. While land may be immoveable property the converse is not necessarily true.

Held on facts: no doubt the land was used for agricultural purposes namely raising of coconut trees, and leasing out, so to speak, or the right to cut and

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*T.C No 62 of 1965
(Reference No. 18 of 1965). 21st August, 1968.

remove the usufruct therefrom. It cannot be said thereby that the source of income of the assessee is the land. The immediate source is the coconut trees. Assuming that the transactions in favour of the assessee amounted to an interest in immoveable property, it does not follow from it that the income for that reason is derived from the land on which the coconut trees stand. The nexus between the income and the land is missing. The connection of the income is with the trees themselves without reference to the land or agricultural operations.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R.A Nos. 1564 and 1565 of 1963-64 (I.T.A.Nos. 4878-4879 of 1962-63) Assessment years 1958-59 and 1959-60) on its file for decision on the following questions of law, *viz*:—

" Whether on the facts and in the circumstances of the case, the two sums of Rs. 8,962 and 8,835 are agricultural income exempt under section 4 (3) (*viii*)?"

V. Balasubrahmanyam and *J. Jayaraman*, Standing Counsel for Income-tax, for Applicant.

K. Srinivasan, D. S. Meenakshisundaram and *K. C. Rajappa*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This reference turns on the character of the income derived by the assessee in respect of the assessment years, 1958-59 and 1959-60. If it is agricultural income, it would be exempt from the charge under section 4 (3) (*viii*) of the Income-tax Act, 1922. The Revenue as well as the Tribunal have all concurred in the view that the assessee will not be entitled to the exemption. At the instance of the Commissioner of Income-tax, therefore, this reference arises under a section 66 (1) and the question is:

" Whether, on the facts and in the circumstances of the case, the two sums of Rs. 8, 962 and Rs. 8,835 are agricultural income, exempt under section 4 (3) (*viii*)."

The assessee at the relevant time was a dealer in coconuts. He also took leases, the transactions have been so described, of coconut thopes from different parties. Some of the transactions were registered and the others were not, but supported by acknowledgments by the lessors. There was a third category of transaction, evident from the entries in the account books. The assessee paid a fixed annual sum and was allowed to enjoy the fruits of the coconut trees for a stipulated period ranging from 1 to 3 years or even longer. Whether the term ran continuosly is not clear from the record. In a few cases there was a stipulation that the lease did not include the land. At the end of the term the assessee should deliver possession of the trees to the lessors. The typical recital is :

" As this sum..........has been received by me in the manner mentioned above, you shall pluck and take the yield of the coconut in the aforesaid thope, enjoy the same and deliver possession of the grove to me at the expiry of the lease............The ground land is not subject to the lease."

In the other cases, it is doubtful whether the land was included in or excluded from their scope.

The Tribunal's view that the income was agricultural income was based on the following reasoning. The right to cut the cocunuts extended over a long period, not merely a particular harvest; in view of this, the lessee must be taken to have the right to see that all future crops for the terms stipulated for accrued to him so that he could reimburse to him all the payments made to the lessor; whereas the purchase of a particular lot or of a standing crop would refer to a commodity *in praesenti*, the taking up on a lease for a long period committed the assessee '*in futuro* ; in the circumstances the lessee had a right and indeed it was in his interest to see that the land was properly kept, well watered, tilled, pruned and fenced so that his interests may be protected. The Tribunal also relied on *Govindaswami Vanniar* v. *Smt. S. Mahalakshmi Ammal*[1], as being in support of its view. It was alive to the fact that there must be some relationship between the produce sold and

1. (1963) 2 M.L.J. 137 : (1963) 76 L.W. 378.

the land from which it was got as to entitle the assessee to claim it as produce from agriculture.

The claim for exemption has been rested on section 2 (1) (*a*) which defines "agricultural income" so far as is relevant to this case. This provision says that, in the Act, unless there is anything repugnant in the subject or context, "agricultural income" means any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in the taxable territories or subject to a local rate assessed and collected by officers of Government as such. Having regard to this definition, an income to be agricultural income should satisfy that it is derived from land, and the land is used for agricultural purposes. To put it differently, there should be a nexus between income, land and agricultural operations, by which is meant something done to the land by human or mechanical agency to produce out of the land any crop, tree, plantation or other produce or product. The immediate source of the income must be land of the description or character mentioned in the definition. Do the facts in this case as to the character of the income satisfy the test ? We are of opinion that they do not. It is obvious that (the test that) the land should be used for agricultural purposes is satisfied. The coconut trees grown on the land are agricultural produce, resulting from agricultural operations. If it is land which is used for agricultural purposes, the next enquiry has to be whether the income is derived from such land. It is here the difficulty for the assessee arises. The contention on his behalf is that a right to exploit or cut and remove coconuts from coconut trees is an interest in immoveable property because the term stipulated was over a period during which the coconut trees derived sustenance from the land, and, this being the case, it is a lease of the land itself with the coconut trees and the income derived in that sense is from the land used for agricultural purposes. We are not convinced that the reasoning is correct. The very case cited for the assessee, *Venugopala Pillai* v. *Thirunavukarasu*[1], brings out the distinction between a lease of land and lease of immoveable property for agricultural purposes. While land may be immoveable property the converse is not necessarily true. That was a case of an agreement of lease in respect of toddy yield from coconut trees, and the question the Court was called upon to decide was whether it was a lease or licence in the context of the requisite of a proper notice to quit under section 106 of the Transfer of Property Act. The Officiating Chief Justice and Yahaya Ali, J., held that it was not a lease of land because they found on a plain reading of the document that the rights created thereunder were only (*i*) the right to enjoy the toddy yield from the trees and (*ii*) the right to enter upon the land for the said purpose. In their view, the transaction amounted to a licence so far as the land was concerned, a licence for the licencee to use it for the purpose of exercising the right to enjoy the toddy yield from the trees. Having said that, the learned Judges proceeded to hold, applying the principle of *Marshall* v. *Green*[2], that the transaction was in any case a lease of immoveable property used for agricultural purposes, and, therefore, a notice to quit was necessary under section 106 of the Transfer of Property Act. Reference was made in that case to the definition of a "lease", "licence" and of "immoveable property" as defined by section 3 (25) of the General Clauses Act.

In *Marshall* v. *Green*[2], the statement of the law which was quoted by the learned Judges is this:

> "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold—from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land, but where, the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold and the contract is for goods."

Applying this test, as was done in the case relied on by the assessee, his learned Counsel urges that if the transaction is regarded as a lease of immoveable property for agricultural purposes, inasmuch as thereby an interest in immoveable property

1. (1948) 2 M.L.J. 155. 2. (1875) L.R. 1 C.P.D. 35 at 39.

is created, it should follow that the income is from land used for agricultural purposes. But, as we said, there is a distinction between an interest in immoveable property and an interest in land. Apart from that, the answer to the question under reference eventually would revolve round whether the income had been derived as agricultural income.

The Privy Council in *Commissioner of Income-tax* v. *Kamakshaya Narayan Singh*[1], explained the scope of the word " derived" in section 2 (1) (*a*):

> " The word ' derived' is not a term of art. Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the effective source is discovered."

Now the genealogy is that there was here a land, that it was used for agricultural purposes, namely, raising of coconut trees, and leasing out, so to speak, of the right to cut and remove the usufruct therefrom. Can it be said that the source of the income of the assessee is the land? To our minds, it does not appear to be so. The immediate source is, as we are inclined to think, the coconut trees. Assuming that Counsel for the assessee is right in his contention that the transactions in his favour amounted to a lease of an interest in immoveable property, it does not flow from it that the income for that reason is derived from the land on which the coconut trees stand. In order to constitute agricultural income there should be a clear nexus between such income, land and agricultural operations. In this case the last two are present but not the first. In our view the nexus between the income and the land is missing. The connection of the income is with the trees themselves without out reference to the land or agricultural operations.

On that view, it would be unnecessary to refer in any detail to two of the cases cited for the Revenue. The first of them, *Yagappa Nadar* v. *Commissioner of Income-tax*[2], a decision of a Full Bench of this Court, held that income derived from toddy was agricultural income within the meaning of section 2 (1) of the Income-tax Act, but only when it was received by the actual cultivator, whether as owner or lessee of the land on which the trees grow. On the facts there, the Court made the observation:

> " No interest in the land has been transferred here and it would appear that what the petitioner has obtained is a mere licence to tap the trees and draw the juice. If that be so, the mere fact that he has to water the trees (and that is not proved to be the case) shows only that the watering is one of the conditions of his license and not an act whereby the agricultural produce has been raised for that was raised before he obtained his license."

The actual decision, therefore, in that case was that the income was not agricultural in character. That, if we may say so with respect, supports the view we have taken of the facts in the instant case.

Commissioner of Income-tax v. *Maddi Venkatasubbayya*[3], relied on for the Revenue may, however, not be quite apposite. For, in that case, as rightly sought to be distinguished for the assessee, the right which was the subject-matter of the agreement related only to cut and remove tobacco which was ripe for harvest and which was cultivated by another, and the transaction did not spread over a period. That means that the interest created by the agreement would not even amount to an interest in immovable property.

We answer the question under reference in favour of the Revenue with costs. Counsel's fee Rs. 250.

V.S. *Answered accordingly.*

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1. (1948) 16 I.T.R. 325 at 328 : (1948) 2 M.L.J. 447 : 75 I A 283: 51 Bom. L.R. 182 : A.I.R. 1949 P.C. 1.
2. (1927) 2 I.C. 470 at 471 : (1927) I.L.R. 50 Mad. 923: 105 I.C. 489: A.I.R 1927 Mad. 1038.
3. (1951) 20 I T.R. 151: (1951) 2 M.L.J. 167: I.L.R. (1952) Mad. 459 : A I.R. 1951 Mad 1007.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Panchayat Board, Karumandi Chellipalayam, represented by its President .. *Petitioner**

v.

The Director of Rural Development, Madras-9, and others .. *Respondents.*

Madras Panchayats Act (XXXV of 1958), section 104—Scope—Panchayat Union markets—Income from—Payment of contribution to the Panchayat—If there should be some nexus between the market and that Panchayat.

When section 104 of the Madras Panchayats Act, 1958, speaks of the income being apportioned between the Panchayat Union Council and the panchayat or the payment of a contribution in respect thereof to the panchayat or the Panchayat Union Council as the case may be, the panchayat referred to can be only the panchayat within whose jurisdiction the market is being held. There must be some nexus between the market and the panchayat in order to justify the payment of contribution to or the apportionment between that panchayat and the panchayat union.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Director of Rural Development, Madras, dated 23rd March, 1966 and made in his proceedings K. Dis. No. 13172/DRD/Accts./5/66, and the order of the Collector of Coimbatore, dated 5th April, 1966 and made in his proceedings Ref. 25621/66/E-15, issued pursuant to the abovesaid order of the Director of Rural Development and quash the same.

R. Ganesan, for Petitioner.

R. Krishnamurthy, for the Government Pleader, for Respondents 1 and 2.

V. Shanmugham, for 4th Respondent.

The Court made the following

ORDER.—The petitioner is the Panchayat Board, Karumandachellipalayam in Coimbatore District. The area comprised within this Panchayat Board was originally part of the Perundurai Panchayat Board. Till 1957, a weekly market was being held within the area of what is now the Perundurai Panchayat Board. In that year, it was shifted to the area which now lies within the jurisdiction of the petitioner Panchayat Board. It is classified as a Panchayat Union market. Under section 104 of the Madras Panchayats Act, 1958, the Government have the power to apportion the income derived from Panchayat Union markets between the Panchayat Union Council and the panchayat or order the payment of a contribution in respect thereof to the panchayat or the Panchayat Union Council, as the case may be. In 1960, the contribution payable under this section was ordered to be paid to the petitioner Panchayat Board and it was fixed at 30 per cent. It was accordingly being paid for some years. In 1965, an order had been passed raising the contribution to 40 per cent. and dividing it between the petitioner panchayat board and the Perundurai Panchayat Board. It is against this order that this writ petition is filed.

I am of opinion that the petitioner Panchayat Board is entitled to succeed. When section 104 speaks of the income being apportioned between the Panchayat Union Council and the panchayat or the payment of a contribution in respect thereof to the panchayat or the Panchayat Union Council as the case may be, the

* W.P. No. 1645 of 1966. 23rd April, 1969.

Panchayat referred to can be only the panchayat within whose jurisdiction the market is being held. There must be some nexus between the market and the panchayat in order to justify the payment of contribution to or the apportionment between that panchayat and the panchayat union. There is no such nexus in this case between the perundurai Panchayat Board and the market. To hold otherwise on the ground that the singular includes plural, would mean that it would be open to the Government to direct the payment of a portion of the contribution not merely to the Perundurai Panchayat Board but to any number of Panchayat Boards within the jurisdiction of the Perundurai Panchayat Union. Of course, the petitioner Board has no right to claim that any particular percentage of the income should be paid to it. It cannot object if the Panchayat Union Council makes any payment to the Perundurai Panchayat Board except to a portion of the contribution or apportionment under section 104. Therefore, if the Government, instead of fixing the portion payable to the Panchayat Board at 40 per cent. and ordering it to be divided equally between the petitioner Panchayat Board and the Perundurai Panchayat Board had merely fixed it at 20 per cent. or even 10 per cent. and ordered it to be paid to the petitioner Board, the petitioner Board can have legally no greivance. The right of the petitioner-Board to object to any portion of the contribution or an apportionment under section 104 arises from the fact that such contribution or apportionment is payable only to the Panchayat within whose jurisdiction the market is held, or as I already pointed out, the Panchayat which has a nexus with the market. As a payment is made to the Panchayat which has nexus with the market, no objection could be taken to the payment to any other Panchayat having a similar nexus. But objection could be legitimately taken to payment to a Panchayat which has no nexus with the market. It follows, therefore, the that petitioner is entitled to succeed in this writ petition. It is unnecessary to point out again that it is open to the Government to restrict the percentage of contribution payable and make it payable only to the petitioner panchayat board, in which case, the petitioner can have legally no grievance. There will be no order as to costs.

V.M.K. *Writ Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE M. NATESAN AND MR. JUSTICE B. S. SOMASUNDARAM.

Muthuraj Koilpillai .. *Petitioner**

v.

Esther Victoria Kannammal .. *Respondent.*

Divorce Act (IV of 1869), *sections* 18 *and* 19—*Declaration of nullity of marriage on the ground of impotency—Impotency, what is.*

Impotency is not necessarily to be confined to the physical inability of one or the other of the spouses to have sexual intercourse. It may cover also such a condition, either of the mind or of the physical condition of the person, which renders normal sexual intercourse impracticable so as to reach its completion.

The evidence on record in the instant case shows that the plaintiff could not at the time of marriage and on the date he instituted have the suit sexual intercourse with his wife the reason being the latter's hysteria or mental depression. It is thus clear that the wife was suffering from such a mental depression which though it did not amount to lunacy bordered on impotency justifying the grant of a declaration that the marriage is *null* and *void* under section 19 of the Divorce Act.

Case referred by the District Judge, Tirunelveli in his letter D. No. 4390, dated 18th June, 1968 for confirmation by the High Court under section 20 of the

* Matrimonial Case No. 8 of 1968. 3rd November, 1969.

Indian Divorce Act the decree *nisi* dated 8th April, 1968 and passed in O.S. No. 64 of 1967 on his file.

K. Ramaswami, K. R. Subramania Ayyar, and *Mrs. A. Surojini Bai*, for Petitioner.

L. Balamukunda Das, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—This matter comes before us on a reference under section 20 of the Indian Divorce Act. The District Judge of Tirunelveli has declared the marriage between the plaintiff and the defendant as null and void and granted a decree of divorce subject to confirmation by this Court.

The plaintiff and the defendant were married on 5th June, 1968, in St. Michael's Church, Polnaickenpatti, Tuticorin, according to Christian rites. There can be no dispute about this. According to the plaintiff, on the very night of the marriage, it was found that the defendant could not have sexual intercourse with him as she was pushing him aside and finally jumped out of bed. He would say that this was due to insanity and at the time of the marriage he did not know about it. The next day the defendant was removed by her mother to her place for treatment and bringing her back. But the defendant never came back. It appears the defendant was working as a mid-wife for some time in the primary Health Centre, Thiruvengampet. But we find that she was discharged from service with effect from 28th June, 1958, as she was suffering from manic depressive psychosis. The proceedings of discharge from service were issued by the District Medical Officer of Ramanathapuram. The record does show that after the marriage the defendant left her husband and never returned to him thereafter. The plaint was preceded by a notice issued by or on behalf of the defendant in which it was alleged that the plaintiff had deserted her and that he was liable to pay her maintenance at a certain rate. In the plaint, while setting out the facts which we have mentioned, the plaintiff asserted that in view of her continued suffering from manic depressive psychosis, she was not in a position to perform the duties of marriage and that she was unfit for married life, though she is an educated girl having studied up to School Final. He also stated that since the marriage had not been consummated because of the defect, the marriage was null and void. That there was no collusion or connivance was averred.

The District Judge in view of *Jayaraj* v. *Seniammal*[1], took coercive steps to secure the presence of the defendant to give evidence in Court. When she was arrested and brought before Court, she gave evidence. In the light of her evidence and on the other materials available the District Judge found that the defendant was suffering from the disease abovementioned and that she was unfit to discharge her marital obligations to her husband. He, therefore, declared the marriage to be null and void.

We have carefully considered the matter and are of opinion that the District Judge was right in granting a decree, though we think it should be sustained on a different reasoning. Since the marriage was on 5th June, 1958, and the discharge of the defendant from service was with effect from 28th June, 1958, there is every probability that the defendant at the time of her marriage did suffer from manic depressive psychosis. In her evidence, which appears to be cogent as far as we can see, she was able to remember her marriage according to Christian rites at Tuticorin and the fact that she never had sexual intercourse with her husband. She admitted that till then she had no desire to have sexual intercourse, though she wanted to have marital life. She was able to recall what precisely she was suffering from and mentioned the disease to be manic depressive psychosis. She claimed that she was all right at the time of her giving testimony and invited that she might be sent to a doctor for examination. This examination was done by Dr. P. R.

1. (1967) 1 M.L.J. 152 : A.I.R. 1967 Mad. 242.

Azeezullah on 27th January, 1968. The doctor was the District Medical Officer, Tirunelveli, at the time. The certificate says:

"I am to state that Smt. Esther Victoria Kannammal was admitted as in-patient in the Government Headquarters Hospital, Palayamkottai, on 18th January, 1968 for observation and discharged on 27th January, 1968. During the period of observation, she has been noticed to be morose mostly, answers questions sometime correctly and sometime irrelevantly. When questioned how long she has been in the Hospital she is not able to say. But she says that she had been here for two or three days. She is not able to say why she is in the Hospital and has no idea regarding the fact that she was sent by Court. She has a vacant look. She seems to be unmindful of the environment and time. She is suffering from mental depression."

This shows that the defendant's mental powers were so impaired as to make her unaware of, of even the time and surrounding and to have a vacant look. The mother of the plaintiff who gave evidence stated that on the day of the marriage her daughter-in-law was not amenable to sexual intercourse with her son and it was reported to her that the defendant was insane because her behaviour appeared to be that of a person with insanity. She also stated that on the very next day of the marriage the defendant's parents came and took her away.

The doctor, who had given the certificate we mentioned, in his evidence in Court was clearly of opinion that the defendant was not in a position to discharge her marital obligations to her husband.

Section 18 of the Indian Divorce Act enables a husband or wife to present a petition praying that his or her marriage may be declared null and void and the grounds on which such a declaration can be obtained are specified in section 19. The first and the third grounds have relevance here, the former being that the respondent was impotent at the time of the marriage and at the time of the institution of the suit and the latter is that either party was a lunatic or idiot at the time of the marriage. The question is, which ground is made out in this case. The learned District Judge has not specified whether it was the one or the other ground that prompted him to grant the declaration. All that he stated was that the defendant was not in a position to discharge her marital obligations to her husband. That reasoning is hardly sufficient to sustain the declaration which he granted.

This is not a case of idiocy at the time of the marriage. That is clear from the evidence, particularly of the defendant herself. She was undoubtedly in a position to appreciate some of the questions at least put to her and answer them as far as she could. A reading of her evidence shows that there was nothing so serious with her mental faculties as to regard them as bordering on idiocy. Lunacy is a large term and includes several degrees of the mind. We are very doubtful whether, having regard to the defendant's mental capacity, as we have mentioned above, she can be rightly termed as a lunatic. No doubt, she had a vacant look and was not in a position to appreciate her surroundings or time. It would appear from the certificate given by the doctor and his evidence put together that she had lucid intervals. But one thing seems to be clear from the evidence on record, and that is that she was not in a position to discharge her marital obligations to her husband. While no declaration, as we think, can be given on the ground that the defendant was a lunatic or idiot at the time of the marriage, the question is whether the declaration granted by the District Judge can be supported on the ground of impotency both at the time of the marriage and at the time of the institution of the suit. The evidence of the plaintiff's mother, which we see no reason to reject, is positive that on the very day of the marriage she knew that the defendant was unfit to discharge her marital obligations due to her behaviour of running away from the bed and also from the fact that the defendant's parents, who were apparently aware of her deficiency, came the very next day and took her away. There is also this fact that, according to the statement of the District Medical Officer, at the time of the defendant's discharge from service, she was suffering from manic

depressive psychosis. This disease as described by the Medical Dictionary and Health Guide by Dr. F. A. Edwards and A. W. Durham is:

"A mental disorder in which excitement and depression may alternate over a period of weeks, months, or even years, Can render a person unfit for employment, but given a little consideration. mild case are employable. Severe cases may have suicidal tendencies."

This definition of the disease does not enable us by itself to conclude that the defendant was suffering from impotency. But the other facts seem to tend towards that effect. What happened on the first day of her marriage and her position since then, her own admission in the evidence that she was unable to fulfil her marital obligations to her husband and the medical examination immediately thereafter as a result of which the doctor gave the opinion that she was not in a position to discharge her marital obligations—all these taken together show that she was suffering from such a mental depression which, though not amounted to lunacy, bordered on impotency.

Impotency is not necessarily to be confined to the physical inability of one or the other of the spouse to have sexual intercourse. It may, in our opinion, cover also such a condition, either of the mind or of the physical condition of the person, which renders normal sexual intercourse impracticable so as to reach its completion. In *K. Balavendram* v. *S. Harry*[1], Rajamannar, C.J., who spoke for the Bench, observed:

"Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, incapacity to have sexual intercourse, which undeniably is one of the objects of marriage. The question is, what does 'sexual intercourse' mean? We cannot do better than refer to what has been considered to be the leading decision on this topic, namely, *D. E.* v. *A. G.*[2]. In that case, the husband prayed for a declaration of nullity of his marriage with the respondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ."

Dr. Lushington dealt with the point and stated, as extracted in the citation under consideration:

"every one was agreed that in order to consutute the marriage bond between two persons, there must be power, present or to come, of sexual intercourse...... sexual intercourse, in the proper meaning of the terms, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go to the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but is so imperfect as scarcely to be natural I should not hesitate to say that legally speaking, it is not intercourse at all......If there be a reasonable probability that the lady can be made capable of a '*vera coupla*' of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unatural coitus, I would pronounce the marriage void."

The case Rajamanner, C.J., was considering left the learned Judges with no doubt that the marriage could not be consumated in the ordinary and normal way on account of an abnormality on the respondent.

Now, in this case, there is no such outward physical disability. On account of her mental disease it was impossible for the plaintiff to have intercourse with the defendant both at the time of the marriage and also at the time he instituted the suit. That, we think may justifiably be brought under the head of impotency in law.

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1. I.L.R. (1954) Mad. 15: (1953) 2 M.L.J. 689: A.I.R. 1954 Mad. 316.
2. (1845) 163 E.R. 1039.

Rayden on Divorce, 9th edition, at page 112, says:

"The presence of a physical structural defect is not essential. The statement by Lord Penzance to the contrary in *T.* v. *M.*[1], is no longer law.......... The basis of the Court's interference is not the structural defect, but the impracticability of consummation."

The learned author goes on to point out that disability arising from mental or moral causes is sufficient, such as hysteria. We are inclined to accept this view as valid in order to bring the case under the ground of impotency. This view receives support as well from *Kishore Sahu* v. *Snehprabha Sahu*[2]. There it was held that incapacity in the woman for sexual intercourse need not be physical and that it may be due as well to mental or psychical causes. It was further pointed out that all that was required was an invincible repugnance to the act of intercourse either generally or with the particular man. The evidence on record in this case shows that the plaintiff could not at the time of the marriage and on the date he instituted the suit have sexual intercourse with the defendant, the reason being the latter's hysteria of mental depression.

On that view, we confirm the declaration that the marriage of the plaintiff and the defendant was null and void.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Chief Justice* AND MR. JUSTICE M. NATESAN.

A. Sanjeevi Naidu and others .. *Petitioners**

v.

The Madras State Transport undertaking by its Director .. *Respondents.*

Motor Vehicles Act (IV of 1939), *sections* 68-*C and* 58-*D—State transport undertaking run by State Government—Scheme of nationalisation of road transport services by—Formation of requisite opinion under section* 68-*C and initiation of scheme—Competent authority—Director of the State transport undertaking if competent.*

Constitution of India (1950), *Article* 226—*Writ of prohibition—When issues.*

Evidence Act (*I of* 1872), *sections* 123 *and* 124—*Claim of privilege under—Scope.*

Per *Anantanarayanan, C.J.*—Where a State transport undertaking is carried on by a State Government, whatever may be the case where the State transport undertaking is of a different description, such as a municipality or a corporation or a company controlled by Government or a distinct road transport corporation, it is this undertaking which has to form the opinion under section 68-C and frame and notify the scheme. Some particular individual even though he may be the chief executive officer of this undertaking cannot form an opinion and frame and publish the scheme, unless under the rules of business or by some delegation of power or function, he is clothed with the authority to do so on behalf of the State Government, which carries on the undertaking.

The Director of the State transport undertaking of Madras who is only the executive head of this undertaking and thereby the head of department, cannot possibly arrive at this opinion and frame and notify the scheme, under the rules of business and the actual conduct of the business of Government of Madras. He may certainly send up proposals and prepare a draft. But until and unless these acts obtain the approval of the Government or which is the same thing, of the State transport undertaking carried on by the Government. which approval has

1. (1865) L.R. 1 P. & D. 31.
2. A.I.R. 1943 Nag. 185.

* W.Ps. Nos. 2303, etc of 1967 and W.As. Nos. 326, etc, of 1967. 23rd November, 1967.

clearly to be intimated through the concerned Secretary to the Government, the Director's proposal can only remain a proposal for action under section 68-C. He cannot, himself assume or arrogate to himself that function.

Kalyan Singh v. *State of U.P.*, (1963) 1 S.C.J. 50: A.I.R. 1962 S.C. 1183, Relied on.

Where the power is conferred upon some particular body and without any statutory authority that body allows some officer or employee to exercise it, that would be illegal and beyond the delegation. Hence if the proposals had been sent by the Director of the State transport undertaking including the draft scheme, and the proposed scheme had been approved by the State transport undertaking carried on by the State Government, which in effect, means the approval of the Government, then further procedure under the scheme would be perfectly legal. But where, as in the instant case, the Director assumes that he is the State transport undertaking carried on by the Government, which he is not, and merely as the head of a department without any authority express or implied to act for the Government in the matter, framed and published the scheme, he must certainly be held to have quite exceeded his power. A writ of prohibition must necessarily issue to restrain him from doing anything further, on such a notified scheme.

A writ of prohibition issues *ex debito justitiae*, where absence of jurisdiction can be demonstrated.

Per *Natesan, J.*—Where a transport under taking is carried on by the state Government, it is the State Government which is the State transport undertaking which has to form the requisite opinion under section 68-C of the Motor Vehicles Act.

Kalyan Singh v. *State of U.P.*, (1963) 1 S.C.J 50: A.I.R. 1962 S.C. 1188, Relied on.

When their Lordships of the Supreme Court observed, in *Kalyan Singh's case*, (1963) 1 S.C.J. 58: A.I.R. 1962 S.C. 1183 that the opinion of the State transport undertaking must necessarily be that of the Government which ran it, State Government was located the power and authority to form the requisite opinion for the statutory entity, the State transport undertaking. To say that the State Government must form the opinion or make the decision wherever an opinion or decision of the State transport undertaking is called for is not to ignore that the Act contemplates two distinct entities, the State transport undertaking and the State Government. It is localising the decision making faculty of the undertaking, speaking figuritively, legally locating the brain or mind of the undertaking. Where a State directly runs an undertaking, it can only be through a department of the Government or a particular officer. The overlapping of functions on the one hand and the necessity for preserving the principles of natural justice on the other when the State Government functions as quasi-judicial authority under seciton 68-D between the undertaking and the private operators, cannot affect the legal concept underlying the principle enunciated by the Supreme Court that the opinion of the statutorily defined undertaking must necessarily be that of the State Government which runs the undertaking.

It is not stated in the instant case that the Director of the State transport undertaking of Madras had been specifically invested with the power required for forming an opinion and framing a scheme under section 68-C. The mere fact that he is the chief executive officer of the transport department of the Government, does not enable him to act as if he were the Government. That is not the way that Government business is done in a democratic State.

A policy decision of the Government broadly setting out the policy in regard to nationalisation of transport services is not the same thing as the precedent opinion called for under section 68-C for putting a draft scheme. Such setting out of policy decision would not authorise the Director of the State transport undertaking to initiate the scheme. Nor would a general authorisation of the

Government permitting the Director to nationalise the routes without prior approval of the Government would be sufficient for this purpose.

Functions or duties vested in the State Government by a statute may be exercised by subordinates, where there is statutory power of delegation or there has been due authorisation under the rules of business framed under Article 166 (3) of the Constitution of India. The Governor may allocate such statutory functions including matters to be dealt with under the subjective satisfaction of the Government to the Ministers by making rules under Article 166 (3) of the Constitution. The Minister in charge may, under standing orders, provide for disposal of the cases in his department. Where there is no provision under law for delegation and the power is vested in the Government, the Government business rules have to be followed for the due exercise of the powers. Subordinate officers may be authorised only in accordance with the rules of business framed under Article 166 of the Constitution and not otherwise, authorisation by statute being another available way.

In the present case admittedly the scheme of nationalisation finalised for publication by the Director of the State Transport undertaking, was not placed before the concerned Minister for his approval ; nor is it claimed that a secretary of the concerned department empowered under standing orders accepted the scheme for publication under section 68-C. The stand taken by the Director of the State transport undertaking was that it was unnecessary at that stage to refer to the Minister or to the Government. There has been a serious misconception in the matter and in the result the condition precedent for the initiation of the scheme are totally absent in this case. The appropriate authority had not formed the requisite opinion before preparing the scheme. Nor did the appropriate authority prepare the scheme for its valid publication. The scheme as prepared and published lacks legal sanction behind it and the further proceedings on such a scheme, inviting objections from parties affected and judicial enquiry thereon are futile proceedings wholly devoid of jurisdiction.

A matter in respect of which (affairs of State in the instant case), privilege is claimed and sustained cannot be on the record and cannot be brought in as evidence in the case.

Petitions under Article 226 of the Constitution of India, 1950 challenging the validity of the scheme promulgated by the Madras State Transport Undertaking represented by its director and seeking to restrain the authority from proceeding further.

M.K. Nambiyar for *K.K. Venugopal* and *V.M. Manivannan*, *V.P. Raman* and *C.S. Prakasa Rao*, for Petitioners.

The Advocate-General (*K. Narayanaswami Mudaliyar*) and *S. Mohan* (Assistant Government Pleader), for Respondents.

The following Orders were made

Anantanarayanan, C.J.:—These writ proceedings involve, essentially, the validity of a scheme said to have been framed and promulgated by the first respondent, namely, the Madras State transport undertaking, here represented by its Director, Mr. T.V. Venkataraman, under section 68-C of the Motor Vehicles Act, 1939 (Chapter IV-A). The writs seek to restrain both the first respondent and the State of Madras (second respondent), from proceeding further with this promulgated scheme, under the relevant sections of the law, on the grounds exhibited in the writ petitions. As is well known, and I do not think that it is necessary, for this purpose, to proceed into the history of the prerogative writ of prohibition in the United Kingdom, a writ of prohibition issues *ex debito justitiae*, where absence of jurisdiction can be demonstrated ; it is not the power to nationalise the road transport service which is in issue, nor the scheme of the relevant sections ; what is claimed is that the promulgated scheme is altogether void, and lacking in jurisdiction. When that is the case, it is for the State Government, carrying on the State transport undertaking, to promulgate the scheme in a valid manner under section 68-C, and then to proceed further. The writs prayed for are thus to be strictly limited in their dura-

tion, and scope. Indeed, Mr. M. K. Nambiyar for the petitioners did not dispute that this identical scheme, whatever might be the subsequent objections thereto under section 68-D, and whatever vicissitudes it might suffer under section 68-E, at a subsequent stage, could be again validly notified in which case, the right to further procedure under the scheme would be legally unassailable.

My learned brother is delivering a separate judgment of extensive traverse, dealing in considerable detail with the vicissitudes of the arguments advanced by the learned Advocate-General on behalf of both the respondents, during a protracted hearing; how the defences to the prayers in the writ proceedings were varied from stage to stage, in the affidavits, so as to be hardly compatible with each other; how, at a subsequent stage, the defence has been evolved that Mr. T.V. Venkataraman has framed and notified the scheme, under some delegation of power which could render his act an act of the State Transport Undertaking carried on by the State Government ; how it has even been faintly suggested that this scheme had ministerial approval.

His exhaustive analysis renders it unnecessary for me to cover the ground again. I shall limit myself to a clarification of the two main issues, which appear to me to be involved in these petitions. Firstly, we have here a scheme validly promulgated under section 68-C of the Act, by the State Transport Undertaking carried on by the State Government particularly bearing in mind the clarification by their Lordships of the Supreme Court in *Kalyan Singh* v. *State of U.P.*[1] If the answer to this question is to be decidedly in the negative, then I am unable to see, whatever the merits of the scheme as framed, and however greatly in good faith Mr. T.V. Venkataraman might have acted, how the respondents could proceed further, under the relevant sections of the law, with a scheme altogether lacking in validlity. The only alternative then would be to re-issue the scheme under section 68-C of the Act, with the impress or sanction of the requisite authority ; in other words, to convert it, by such re-issue into a scheme really promulgated by the State Transport undertaking carried on by the State Government. Secondly, there is the related question whether, under some delegation of power in the administrative correspondence made available to us, Mr. T.V. Venkataraman could claim that he was clothed with the necessary authority to express the satisfaction of the State Transport Undertaking carried on by the State Government, that

> "for the purpose of providing an efficient adequate, economical and properly co-ordinated road transport service,"

It was necessary, in the public interest, to frame, notify and implement the scheme. It is, indeed not disputed by the learned Advocate-General that it is the State Transport Undertaking carried on by the State Government that has to form this judgment, to frame the scheme, and to promulgate it in the manner prescribed by the rules. The precise difficulty is whether the scheme framed by Mr. T.V. Venkataraman, and notified with his signature, has this status notwithstanding the fact that Mr. T.V. Venkataraman is, indisputably, the Director or executive head of the State Transport Undertaking appointed as such. Obviously, this matter will have to be viewed from the perspective, either that the scheme as framed and notified is *ex facie* valid, or that, if it lacks this validity, it can be justified on the basis of a valid delegation of authority or function. There is also a third and related argument, put forward by the learned Advocate-General, that the policy of nationalisation was expressly approved by Government in G.O.Ms. No. 2007 (Transport) Industries, Labour and Housing, dated 17th June, 1967, and hence that we ought not to inhibit the respondents from proceeding further with the scheme under the Act, when, at least, there has been this declaration of the intention of the Government to pursue this policy to a finish.

At the first blush, it might well appear as if the writ petitions are sought to be sustained and pressed home, upon a very technical or formal basis. Here it could

1. (1963) 1 S.C.J. 50: A I R 1962 S.C. 1183.

be argued, we have a scheme framed by Mr. T.V. Venkataraman, who is admittedly the Director of the State Transport Undertaking, and, as set forth in the counter-affidavit of Mr. Lakshminarayanan, Secretary to the Government in the Industries, Labour and Housing Department, by virtue of his office the head of the department. Mr. T.V. Venkataraman himself claimed that as the *Chief Executive Officer of the State Transport Undertaking*, he was competent to formulate and publish the scheme under section 68-C of the Act. It could be contended that delegation itself is needless, and that, even if the view be taken that delegation of power is essential, the administrative correspondence made available to us at least shows that, without the prior approval of Government, Mr. T.V. Venkataraman was permitted to frame and notify such a scheme under section 68-C; that is to say, he was permitted to act, in respect of this power under section 68-C on his own authority and in his own right But as I shall presently show, such a perspective misses altogether certain refinements which are both implied and expressed in the statute isteself, and in recent decisions of the Supreme Court. Since this matter involves careful analysis, I do not think that any apology is necessary for proceeding at once into this aspect, which is really the heart of the controversy.

It is necessary, at the outset itself, to set forth *verbatim* (*i*) sections 68-A, 68-C, 68-D and 68-E of the Motor Vehicles Act, (*ii*) section 68 (1) of the Act (*iii*) rule 294-C and rule 294-E of the Rules framed under the Act and (*iv*) the preamble to the scheme in form I, under rule 294-C, which was actually promulgated with the signature of Mr. T.V. Venkataraman. Since reference may be repeatedly necessary to the contents of these sections and rules, I shall first set them forth before embarking in the analysis of the legal implications.

"68-A. In this Chapter, uness the context otherwise requires:—

(*a*) 'road transport service' means a service of motor vehicles carrying passengers or goods or both by road for hire or reward;

(*b*) 'State Transport Undertaking', means any undertaking providing road transport service, where such undertaking is carried on by,—

(*i*) the Central Government or a State Government;

(*ii*) any Road Transport Corporation established under section 3 of the Road Transport Corporations Act, 1950;

(*iii*) the Delhi Road Transport Authority established under section 3 of the Delhi Road Transport Authority Act, 1950;

(*iv*) any municipality or any corporation or company owned or controlled by the State Government.

* * * * *."

"68-C. Where any State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons or otherwise, the State Transport Undertaking may prepare a scheme giving particulars of the nature of the srevices proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the Official Gazette and also in such other manner as the State Government may direct."

"68-D. (1) Any person affected by the scheme published under section 68-C may, within thirty days from the date of the publication of the scheme in the Official Gazette, file objections thereto before the State Government.

(2) The State Government may, after considering the objections and after giving an opportunity to the objector or his representatives and the representatives

of the State transport undertaking to be heard in the matter, if they so desire, approve or modify the scheme.

(3) The scheme as approved or modified under sub-section (2) shall then be published in the Official Gazette by the State Government and the same shall thereupon become final and shall be called the approved scheme and the area or route to which it relates shall be called the notified area or notified route :

Provided that no such scheme which relates to any inter-State route shall be deemed to be an approved scheme unless it has been published in the Official Gazette with the previous approval of the Central Government."

"68-E. Any scheme published under sub-section (3) of section 68-D may at any time by cancelled or modified by the State Transport undertaking and the procedure laid down in section 68-C and section 68-D shall, so far as it can be made applicable, be followed in every case where the scheme is proposed, to be modified as if the modification proposed were a separate scheme.

* * * * *"

"68-I. (1) The State Government may make rules for the purpose of carrying into effect the provisions of this Chapter.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*a*) the form in which any scheme or approved scheme may be published under section 68-C or sub-section (3) of section 68-D ;

(*b*) the manner in which objections may be filed under sub-section (1) of section 68-D ;

(*c*) the manner in which objections may be considered and disposed of under sub-section (2) of section 68-D ;

(*d*) the manner of service of orders under this Chapter ;

(*e*) any other matter which has to be, or may be prescribed."

"*Rule* 294-*C*. Every scheme for road tranpsort service and every scheme proposing modification of an approved scheme prepared by the State transport undertaking shall be published by the State transport undertaking in Form I or I-A as the case may be, in the *Fort St. George Gazette*. A copy of every scheme as proposed to be published in the *Fort St. George Gazette*, shall be submitted to the Government by the State transport undertaking."

"*Rule* 294-*E*. Apart from the publication in the *Fort St. George Gazette*, all schemes formulated by the State transport undertaking and all schemes approved or modified by the Secretary to Government, Home Department, on behalf of the State Government shall be published at least in one daily newspaper circulating in the area involved. Copies of the schemes shall also be put up on the notice boards of the Secretariat and offices of the State transport undertaking, the State Transport Authority and the Regional Transport Authorities concerned."

Preamble of the scheme promulgated.

"Whereas the State transport undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that the passenger transport service in relation to the area/route specified in the Schedule I hereunder should be run and operated by the Madras State Transport Department :

And whereas the State transport undertaking have prepared a scheme for the purpose, as set out in the Schedule II hereunder the same is hereby published for the information of the public as required under section 68-C of the Motor Vehicles Act, 1939."

Before proceeding to the authorities upon the main argument, which arises on the framing and promulgation of the scheme by Mr. T.V. Venkataraman, I would

like to emphasise the implications of the language employed in several of the sections themselves. Those implications derive considerable reinforcement and authoritative support, from the observations of their Lordships of the Supreme Court in more than one decision, particularly in *Kalyan Singh's case*[1]. As will be clear from a perusal of section 68-A, sub-clause (*b*), State transport undertaking may be of several categories. For instance, a State transport undertaking can be a road transport corporation established under section 3 of the Road Transport Corporation Act, 1950—(section 68-A (*b*) (*ii*)) ; it could be the Delhi Road Transport Authority ; it could be a municipality or a corporation or company owned or controlled by the State Government. It could also be an undertaking carried on by the Central Government or an undertaking carried on by the State Government. In the present case, it is the State Government which carries on the State transport undertaking of Madras, and, indisputably, that undertaking is a part of Government, or a department of Government.

That is so, by explicit admission. Another important matter that we may note, at the outset itself, is that sections 68-C, 68-D, 68-E and 68-F provide for a continuous statutory procedure of nationalisation of road transport. That procedure has to commence with the subjective satisfaction of the State Transport undertaking, upon several factors or ingredients, as Mr. Nambiyar has rightly stressed. The first is the objective of efficient transport service ; the second is adequacy ; the third is economical and proper co-ordination ; fourth is public interest, and the final factor is, whether such considerations involve the nationalisation of an area or route, totally excluding other persons such as private stage operators, or only to a partial extent. Though we have authority for the view that this satisfaction can be validly arrived at in any manner, of which Courts can take cognizance, and that such words as *in the opinion of*, need not be necessarily embodied in the draft scheme, there can be no doubt whatever that this satisfaction must be shown to have existed, when the scheme was framed and promulgated. At least one decision of the Supreme Court supports the view that the presence or absence of such satisfaction, in respect of a statutory function which is an essential pre-requisite under the statute, is justiciable.

If we suppose, for a moment, that the decision was not that of the State transport undertaking carried on by the State Government, nor could it be possibly characterised as a decision of that legal entity, but was merely the decision of a particular officer, who could not, under the rules of business, take such a decision at all the formidable argument behind the writ proceedings emerges clear. For, if we assume lightly and in a superficial manner, that anybody who is the chief executive in such an undertaking could exercise such a statutory function, and that this is purely an argument of form and not of substance, then the statutory function could have been exercised, not necessarily even by Mr. T.V. Venkataraman, but by his assistant, or by any ministerial officer in the office. As I shall presently show, we have ample authority for the view that these are not the implications of these sections, and that the exercise of the statutory function under section 68-C, and the actual framing of the scheme in pursuance of the satisfaction, are matters of considerable importance, likely to affect the rights and interests of many private persons which cannot be left to the not empowered initiative of some particular officer, who has no sanction for his act. Of course, if there is a valid delegation of power, that is another matter, and it may be good defence. It is not necessary to dwell much upon rules 294-C and 294-E, or on the form of scheme published under the rules ; they are intended to carry out the implications of section 68-C, and derive their support from the substantive section.

I shall immediately proceed to a review of the authorities made available to us, which throw some light on the question whether Mr. T.V. Venkataraman could have framed and notified such a scheme under section 68-C, as though these were the acts of the State transport undertaking carried on by the State Government. It

1. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183.

appears to me to be very clear that he could not have done so, and that even the delegation, or the purported delegation, relied on in the administrative correspondence, totally fails, when it is carefully scrutinised.

In *G. Nageswara Rao* v. *A.P.S.R.T. Corporation*[1], their Lordships were concerned with a situation, the essence of which could be stated in the following form. When the Hyderabad State came to an end in November, 1956, the road transport department of the Andhra Pradesh became the State transport undertaking, within the meaning of the Hyderabad Act, but that Act was in force only in the Telengana area. Chapter IV-A of the Motor Vehicles Act came into force in February, 1957, and, as this applied to the whole State of Andhra Pradesh, the Hyderabad Act was deemed to have been repealed by necessary implication. Their Lordships held that the fact that this undertaking was at that time providing road transport service only in a part of the State, did not render it anytheless the *State transport undertaking* within the meaning of that term. The question arose in this case, whether the necessary element of subjective satisfaction could be shown to have existed. In this case, the words *in the opinion of* were omitted, but the preamble to the scheme recited the other factors of efficiency, adequacy, economical and proper co-ordination and public interest. Their Lordships held, in consequence, that to require anything further, by way of proof, was to carry technicality to a breaking point. In this context, *Krishnayya* v. *State of Andhra Pradesh*[2], may also be referred to. As the division Bench held in that case, the failure to mention the words *is of opinion*, was not in any way fatal to the scheme.

In *Kashi Prasad* v. *R. T. Authority*[3], a single Judge of that Court had to consider the argument that where the scheme was framed not by the transport department, but by the Government itself, this was contrary to section 68-C of the Act. The learned Judge held, after an analysis of Articles 154, 162 and 166 of the Constitution, that state road transport was a matter falling within the executive power of the Government and hence that the action has really to be that of the Government of the State, taken in the name of Governor, under the Articles of the Constitution and the rules of business. The matter received detailed exposition in *Kalyan Singh's Case*[4], which I have already referred to. The situation in that case was the precise converse of the situation in these writ proceedings. The scheme was initiated, framed and notified by the State Government, precisely as in *Kashi Prasad* v. *R. T. Authority*[3]. The argument was that it is the State transport undertaking, a distinct jural entity, which has to form the opinion and frame and publish the scheme, and that, as the State Government acted in the case, the scheme was not valid at all. After setting forth the relevant provisions, their Lordships elucidated the legal implications in the following passages, at pages 1186 and 1187, which are of considerable importance in the present context. I, therefore, feel that no apology is needed for setting forth these passages *verbatim* here.

> "The effect of the said provisions, insofar as they are relevant to the present inquiry, may be stated thus: The State transport undertaking is an undertaking providing road transport service which is carried on by the State or any other corporation or authority mentioned in section 68-A. The definition creates a statutory authority distinct from authorities which run it. This is made clear by section 68-C, whereunder it is the State transport undertaking that will have to form the requisite opinion.
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> It is true that the provisions maintain a distinction between a State transport undertaking and the State Government. It is also true that the State Government has to hear the objections of the aggrieved parties and also the representatives of the State transport undertaking before approving or modifying the scheme

1. (1959) S C J. 967 : (1959) 2 An. W R. (S.C.) 156 : (1959) 2 M L J (S C) 156 : A I.R 1959 S C 308.
2. (1958) 2 An.W.R. 211 : A.I R. 1959 A.P. 292.
3. A I R. 1961 All. 214.
4. (1963) 1 S C J 50 : A.I.R. 1952 S.C. 1183.

indicating thereby that the State Government has to decide the dispute that may arise between the two contestants. Though the functions of the different bodies are clearly demarcated in the case of undertakings run by corporations, there is overlapping in the case of an undertaking run by a State Government. This may lead to an anomalous position, but in practice it can be avoided, if the State Government creates a department to be in charge of the undertaking and hears the objections and approves or modies the scheme in a manner without violating the principles of natural justice.

A State transport undertaking means, *inter alia*, an undertaking run by a State. The statutory authority created is an undertaking run by a State. The State can only run an undertaking through its officers, it may entrust the conduct of the transport service to a particular officer or to a department of the State, in either event, it is the State Government that runs the undertaking. The statutory authority, namely, the State transport undertaking has to form an opinion within the meaning of section 68-C of the Act, and the opinion must necessarily be that of the State Government which runs it. If the State Government running an undertaking forms an opinion, it can legitimately be said that the statutory authority, *i.e.*, the State transport undertaking has formed the opinion.

* * * * * *

The opinion must necessarily be formed by somebody to whom under the rules of business the conduct of the business is entrusted and that opinion, in law, will be the opinion of the State Government."

These passages cannot admit of any doubt in the interpretation of section 68-C, or the application of that section of law to a situation of this kind. Where a State transport undertaking is carried on by a State Government, whatever may be the case where the State transport undertaking is of a different description, such as a municipality or a corporation or a company controlled by Government, or a distinct road transport corporation, it is this undertaking which has to form the opinion and frame and notify the scheme. Some particular individual, like Mr. T. V. Venkataraman, even though he may be the chief executive officer of this undertaking, cannot form an opinion and frame and publish the scheme, unless, under the rules of business or by some delegation of power or function, he is clothed with the authority to do so on behalf of the State Government, which carries on the undertaking. This point can be acutely illustrated by a simple example. In the present case, we have a Government order, to which I shall make reference later, embodying a policy decision of Government that routes should be nationalised under a phased programme. But, obviously, the question whether it should commence at a particular point of time, by the framing of a scheme under section 68-C, which routes should be taken up under that scheme, how far private operators should be permitted or totally excluded under the scheme of nationalisation, are all vital matters, in regard to which an opinion has to be formed, and the scheme has to be framed, by the State Transport undertaking carried on by the State Government, that is, by or authorisedly on behalf of the Government. Suppose this authority is lacking, and Mr. T. V. Venkataraman, in good faith, thinking that he has the authority to do this, frames and promulgates the scheme, but the State Government has a different view about the actual timing of the policy, or the commencement of nationalisation. The learned Advocate-General conceded that, in such a contingency, it will obviously have to be the view of the State Government that should prevail, and the scheme itself would not be valid. The weakest part of the affidavits filed before us, apart from the question of any delegation to which I shall separately refer, concerns the right, authority or power of Mr. T. V. Venkataraman, to have arrived at this opinion, and to have framed the scheme at all.

As far as I am able to gather from the material made available to us, he has no such right or power, and he is simply not empowered to act under section 68-C,

in any such manner as to make that act that of the State Government or the State transport undertaking carried on by the State Government, which is identical, in effect, according to the dicta in *Kalyan Singh's case*[1]. If, it is argued, there is some implied location of the power in Mr. T. V. Venkataraman, merely because he is the chief executive officer of the undertaking, the simple answer to this would be that he is only the head of a department, according to the very averments in the counter-affidavits. Under the rules of business, which have been made available to us, and also according to the entire scheme of the administration of Governmental matters from day to day, as we understand it, the Minister in charge of the subject has to approve, or to take a decision, in every matter of any consequence; the concerned Secretary expresses this approval or decision and it is then the act of the Government. As may learned brother has shown, in detail, the original argument of the learned Advocate-General did not at all amount to this. The argument simply was that Mr. T. V. Venkataraman, head of the road transport department, had formed the opinion, and framed the scheme, and that Government now stood by the scheme, so framed and notified. This is a far different thing, from a valid promulgation. The answer to it is the simple answer that nothing prevents the the Government, or prevented the Government, at any time during the protracted hearing of these petitions, from accepting the scheme as that of the State transport undertaking carried on by the State, and duly notifying it as such. Until this was done, it was very difficult to see how Government could proceed further, on the scheme framed and promulgated by Mr. T. V. Venkataraman, without due authority; for that matter, his assistant or his chief ministerial officer could equally purport to do so.

In *Messrs. Samarth Transport* v. *T. B. Chavan*[2], an argument was put forward that Government could not both frame a scheme under section 68-C, and be the judge thereof under sections 68-D and 68-E, and that this would be violative of the principles of natural justice. The learned Judges of the division Bench held, that there was no such implicit conflict in the situation which would make the Government judge in their own cause, and, indeed, the solution to this is expressly set forth in *Kalyan Singh's case*[1]. *Birajmohan Das Gupta* v. *The State of Orissa and others*[3], need not detain us, because that related to the power of the transport controller to actually publish the scheme, and all that the decision held was that the publication was valid. Certainly, as pointed out by their Lordships, the prepared scheme has to be published by the State transport undertaking, and any requisite officer could do so, in the Gazette. The present attack is the far more substantial one, that Mr. T. V. Venkataraman, by himself, could not arrive at this opinion, under section 68-C, and frame and notify the scheme. In any event, unless some authority is shown, which would render these acts of his, the acts of the State Government carrying on the undertaking, they are necessarily lacking in sanction, and, therefore, invalid.

A similar situation arose in *Chandra Kishore* v. *State of U. P.*[4], before Oak, J. The argument was that there was no State transport undertaking as such in Uttar Pradesh, and that the notification of the scheme was not in the prescribed form; those arguments were met and repelled by the learned Judge.

This may be the convenient context, for reference being made to Articles 162 and 166 of the Constitution and in the rules of business, as made available to us, and further to the question whether *ex facie*, Mr. T. V. Venkataraman, could claim that he had the requisite power to arrive at the opinion and frame the scheme, under section 68-C. As regards the formation of the opinion, the point that I would like to stress is not that the preamble, as published, is not adequate; on the contrary

1. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183.
2. I.L.R. (1960) Bom. 978.
3. (1962) 1 S.C.R. (Supp.) 681.
4. A.I.R. 1963 All. 301.

it is in a form, which includes the ingredients under section 68-C, and whether the words *in the opinion of* are stated or otherwise, will not be relevant. But there is the very important point here, that the existence or non-existence of such an element of satisfaction or formation of opinion, is certainly justiciable. A decision of great importance, in this context, is *Hamdard Dawakhana* v. *Union of India*[1]. Their Lordships observed at page 1172:

> "Mr. Pathack contends, and rightly, that the condition prescribed by the 1st part of section 3 (1) of the Act is a condition precedent (formation of opinion of necessity or expediency) and it is only when and after the said condition is satisfied that the power to issue a regulatory order can be exercised by the Central Government............It is true, as Mr. Pathack contends, that in the absence of any specific averment......no presumption can be drawn that such an opinion has been formed;...................."

In the present cases, the issue can be expressed in this brief argument. Some one, authorised to do so, has to form the opinion on behalf of the State Government carrying on this undertaking, and to frame the scheme. All the matters that the scheme deals with, namely, the precise routes taken up for nationalisation, the inclusion or exclusion of private operators, in whole or in part, etc., are vital matters, to be considered by the same authority. Apart from the administrative correspondence about delegation of power or function, which I shall, for the moment, segregate, Mr. T. V. Venkataraman, had no power to form this opinion, and to frame the scheme, as I undersand the rules of business and the actual administration of the Government. There is considerable confusion about the impact of the rules of business framed under Article 166 of the Constitution. A copy of the rules has been made available to us, and it is very clear that, under the rules, different subjects have to be allocated, as between the different Ministers; in other words, to be included in the respective portfolios. Only a very partial list of the subjects, as supposed to be inclusively classified for such allocation, has been made available to Court. Certainly in this truncated or incomplete list, *Transport and nationalised transport* are subjects allotted to the Minister for Public Works, M (W), and, according to Mr. Lakshminarayanan, this subject has to be dealt with by this Minister, and he is the concerned Secretary. This matter itself is in considerable doubt, for Mr. Nambiyar has placed before us certain material to show that *Motor Vehicles Act* is a classified subject, and, undoubtedly, the exercise of the power under section 68-C would appear to fall under this category. Very probably, *Nationalised transport* is a subject, the content of which can only be related to the point of time *after* the scheme has been finally published under sections 68-D and 68-E, and not before. Further, accepting, as argued by the learned Advocate-General, that different Secretaries may function under the same Minister for differing subjects or branches, still Mr. Nambiyar has been able to show that rules promulgated under the Motor Vehicles Act, or the State amendments themselves, have been Gazetted with the signature of the Home Secretary, and not Mr. Lakshminarayanan.

However that might be, Mr. T. V. Venkataraman, who is only the executive head of this undertaking, and thereby the head of department, cannot possibly arrive at this opinion, and frame and notify the scheme, under the rules of business, and the actual, conduct of the business of Government. He may certainly send up proposals, and prepare a draft. But as I understand it, until and unless these acts obtain the approval of the Government, or, which is the same thing of the State transport undertaking carried on by the Government, which approval has clearly to be intimated through the concerned Secretary to the Government Mr. Venkataraman's proposal can only remain a proposal for action under section 68-C. He cannot, himself assume, or arrogate to himself that function.

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1. (1965) 2 S.C.R. 192 : A.I.R. 1965 S.C. 1167.

On the matter of the importance of this principle, as a question of law, Mr. Nambiyar has referred to the well-known decision, *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*[1]. On the facts in that case, it was the Commissioner of Police, certainly a person subordinate to Government, who was vested with the authority to grant or revoke a licence. It was held that the State Government could not usurp this function or discretion; such an act would be invalid. In *Godavari* v. *State of Maharashtra*[2], the question has received elaborate treatment whether the satisfaction, on behalf of the State Government, should be that of the Governor, or could be that of the Home Minister. In this connection, I may also refer to *King Emperor* v. *Sibnath Banerji*[3], where the Judicial Committee dealt with rule 26 of the Defence of India Rules, in the light of sections 49 and 59 of the Government of India Act, 1935 corresponding to Article 166 of the Constitution. Two passages from authoritative treatises have also been relied on. The first is, *Administrative Law* by J. F. Garner (1963) edition), pages 112 and 113. This deals with procedural *ultra vires*, and refers to *Vine* v. *National Dock Labour Board*[4], for an act beyond the scope of the delegation. The author points out that procedural *ultra vires* under the several categories relating thereto,

"applies, in short, to all persons who are empowered by statute to do anything."

Another passage of great interest is *Administrative Law* by H.W.R. Wade (1961) edition), page 51 which also refers to *Vine's case*[4], and it rests on the broad statement that where the power is confered upon some particular body, and without any statutory authority that body *allows some officer or employee to exercise it*, this would be illegal, and beyond the delegation. These authorities are pertinent to the present context, for, if the proposals had been sent by Mr. T. V. Venkataraman, including the draft scheme, and the proposed scheme had been approved by the State transport undertaking carried on by the State Government, which, in effect, means the approval of the Government, then further procedure under the present scheme would be perfectly legal. But where Mr. T. V. Venkataraman assumes that he is the State transport undertaking carried on by Government, which he is not, and merely as the head of a department, without any authority, express or implied, to act for Government in this matter, frames and publishes the scheme, he must certainly held to have quite exceeded his power. Writs of prohibition must necessarily issue to restrain him from doing anything further, on such a notified scheme. Matters, of course, can very easily be set right, by the re-publication of the scheme as one having the approval of Government carrying on the State transport undertaking, as we repeatedly pointed out to the learned Advocate-General, during the course of arguments.

Before dealing with the delegation, I might deal very shortly with G.O.Ms. No. 2007, dated 17th June, 1967, since that has been relied upon. Certainly, this proceeding does embody the opinion of Government approving the policy of nationalisation. It also embodies the decision of Government with regard to the categories of routes that must be nationalised. There is the further decision that they should be nationalised *as and when the permits of the private operators expire* and this Government order probably does empower Mr. T. V. Venkataraman to take all proceedings, at the proper moment, for drawing up schemes including the preambles thereto, and obtaining the approval of Government. But it has to be carefully noted that this Government order is not equivalent to any decision of the Government under section 68-C of the Act. It is very explicable preliminary decision thereto, but the Government order is not the commencement of any part of the statutory procedure under sections 68-C, 68-D and 68-E of the Act, including the

1. (1951) S.C.J. 803 : (1952) S.C.R. 135 : (1965) 65 L.W. 212.
2. (1965) 2 S.C.J. 523 : (1965) 6 S.C.R. 446 : (1965) M.L.J. (Crl.) 765 : A.I.R. 1964 S.C. 1128.
3. L.R. 72 I.A. 241 : (1945) 1 F.L.J. 222 : (1945) 2 M.L.J. 325 : (1945) F.C.R. 195 (P.C.).
4. L.R (1957) A.C. 488 : (1957) 2 W.L.R. 106 : (1956) 3 All E.R. 939.

most initial one of the framing and the notification of a scheme, by the State transport undertaking. The argument of the learned Advocate-General that this Government order would be sufficient compliance with section 68-C, cannot at all be accepted. For, it is not referable to that statutory provision at all. It is what it purports to be, purely and simply, a record of a policy decision.

Having discussed these aspects so far, I propose to deal very briefly indeed with the matter of the actual delegation, for two reasons. Firstly, my learned brother is dealing with it in great detail, and I cannot add anything to his exhaustive treatment. Secondly, it appears to me that the point involved is a very simple one, what is the effect of the administrative correspondence that has been made available to us? If the effect of this correspondence is not to establish any valid delegation of power or function to Mr. T. V. Venkataraman, which would have enabled him to act under section 68-C on behalf of the State transport undertaking, then I am quite unable to see how this material is really germane to the purpose, or what further use we can make of it. As Mr. Nambiyar points out, once we concede that, in the case of a State transport undertaking, as this is, carried on by the Government, Government must form an opinion and notify the scheme, though through their officers, then any delegation of such a statutory power must either be derived from the statute itself, or from the rules thereunder. In the case of a statutory power or function, it is obviously desirable that delegation should be derived from the statute itself, be referable to it, and be limited to the scope of the phraseology used in the statute.

There is no such delegation here, and this is conceded. For instance, if we assume that there is some independent State transport undertaking, of one of the categories mentioned in section 68-A, and a clerk of this undertaking purports to exercise the power in section 68-C, it will at once be obvious that this can be valid, only if it is sustained by an express delegation on the part of the officer who is empowered to act as representing the undertaking. What has really happened in the present cases is very clear from the several documents, concerning one or two of which privilege was fleatingly claimed at one stage of the arguments, but which have now been finally made available to Court. It appears that, with regard to the implementing of the policy of nationalisation, Government authorised an *ad hoc* committee by G.O.Ms. No. 2008 (Tpt.), dated 17th June, 1967. This included the Director of Transport, Mr. T. V. Venkataraman, the Secretaries to Government, Home and Finance and several other highly-placed officers. It is clear that the Director, Mr. T. V. Venkataraman, prayed that a general order issued might be by Government, permitting him to nationalise the routes. Committee seems to have approved this procedure and Mr. Lakshminarayanan, Secretary to Government, put up a brief note about this to the Minister for Works. We are assuming, for the moment, that the Minister for works, had power to deal with matters under section 68-C, though this is extremely doubtful: *Motor Vehicles Act* is a distinct subject, and it is not, and has never been, included in his portfolio, as far as we can judge. However that might be, I note that Mr. Lakshminarayanan sent a demi-official letter, dated 4th July, 1967, to Mr. T. V. Venkataraman, agreeing to his request for framing and notifying schemes *without prior approval of Government.* The words *you may take action accordingly* follow this sentence. As far as we are able to judge, this cannot amount to any delegation of the power to arrive at an opinion under section 68-C, and to take action accordingly, including the vital aspect of the degree to which private operators on the routes to be taken up for nationalisation are to be allowed to operate further, or are to be totally prevented from doing so. Where the statute and the rules are silent about any such delegation, and that is indisputably so, such vague language, which amounts, in strict interpretation of the phraseology, only to the promise that Government will not repudiate any such act is clearly not a delegation of the statutory power which Courts can recognise. The Government merely agreed that Mr. T. V. Venkataraman, may act in this matter without their prior approval or sanction; conceivably this can amount to an assurance that Government will subsequently ratify his acts. But

this is the crux of the question. Until and unless Government accords such ratification and adopts the scheme as that of the State Transport Undertaking it cannot be said that there is a scheme validly promulgated under section 68-C. It is for this reason that we repeatedly pointed out to the learned Advocate-General that all that is required is a publication of the scheme of Mr. T. V. Venkataraman, in tact and as it appears, under the authority of Government. Once that is done the further steps under section 68-D (1) would follow and objections will have to be filed within thirty days of this. But until it is done, I cannot accept that there is any scheme in existence, which represents an act, under section 68-C by the State Transport Undertaking carried on by Government within the scope of *Kalyan Singh's case*[1].

The writs of prohibition which we direct to issue are, thus, of a restricted scope and duration. They will operate only until the State Transport Undertaking carried on, by the Government promulgates this scheme, that is, until it is made an act of the State Government, which carries on the undertaking. The moment that is done, the writs of prohibition can no longer be operative, and the further procedure will have to inevitably follow.

Natesan, J.—In this batch of writ petitions under Article 226 of the Constitution certain passenger bus transport operators question the validity of a scheme for nationalisation of certain bus routes published in the *Fort St. George Gazette* dated 26th July, 1967, under section 68-C of the Motor Vehicles Act (Central Act IV of 1939), and pray for the issue of writs of prohibition, prohibiting further proceedings under the proposed scheme. The principal ground of challenge to the scheme is that as the appropriate authority—according to the petitioners the State Government—has not formed an opinion as required under section 67-C of the Act that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service the proposed scheme should be put into operation in public interest, a condition precedent to the initiation of the scheme, the promulgation of the scheme was invalid and the respondents had no jurisdiction to proceed further in the matter. Several other grounds questioning the validity of the scheme have also been raised in one or other of the petitions; but as the above challenge to its validity goes to the root of the matter and may quite properly be a subject for a writ of prohibition, we heard arguments only on this ground of attack. The connected writ appeal, Writ Appeal No. 326 of 1967, arises out of an order passed by our learned brother Kailasam, J., overruling the above contention on the merits in an interlocutory application for stay of further proceedings pending disposal of the main writ petition. The other writ appeals also arises out of interlocutory orders. It is unnecessary, having regard to the question that falls for decision, to refer in detail to the facts in the several petitions. It will be sufficient to set out the facts in one of the cases, Writ Petition No. 2303 of 1967 on the interlocutory order from which Writ Appeal No. 326 of 1967, was preferred.

The petitioner in Writ Petition No. 2303 of 1967 was having a stage carriage permit on the route Madras (Broadway) to Cheyyar a distance of 66 miles, and the permit in question was due to expire on 19th October, 1967. It was an inter-district route and in due course in May, 1967 itself he applied for renewal of the primary authority, the Regional Transport Authority, Chingleput, and the counter-signing authorities, the Regional Transport Authority, North Arcot, and the Regional Transport Authority, Madras. While the Regional Transport Authority, Madras, notified his application for renewal on 23rd June, 1967 itself under section 57 (3) of the Motor Vehicles Act, 1939, the Regional Transport Authority, North Arcot, notified the application on 10th July, 1967 and the Regional Transport Authority, Chengleput, on 1st August, 1967. No objections were filed within the time before

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1. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183.

the Regional Transport Authorities, Madras and North Arcot. As the application for renewal was notified by the Regional Transport Authority, Chingleput, only on 1st August, 1967 and meanwhile the impugned scheme under section 68-C which would cover the route in question was published, the Madras State Transport Undertaking, the first respondent herein, filed objections to the renewal of the permit on 9th August, 1967 on the ground that the undertaking proposed to ply its own vehicles on the route. Under the proposed scheme the first respondent intends to take over routes extending over 75 miles, routes terminating at or starting from the City of Madras and all routes within the district of Kanyakumari starting from or ending in the district. It is stated that on a rough estimate about 800 buses will be included in these categories. In applications for interim relief in some of the petitions it was brought to our notice that the renewal applications in cases where permits were about to expire were not taken into consideration even though the applications had been made well in advance and in normal course should have been disposed of before the expiry of the permits. It is complained that deliberately even the consideration of applications for temporary permits pending decision on the applications for renewal was being postponed.

The publication of the scheme in question is found in Part III of *Fort St. George Gazette*, (Extraordinary,) dated 26th July, 1967, containing notifications by Heads of Departments, etc. It is headed as *Scheme of State Transport Undertaking* and is in form I under rule 294-C of the Madras Motor Vehicles Rules, 1949. The preamble to the notification runs thus :

> "Whereas the State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that the passenger transport service in relation to the area/route specified in the Schedule I hereunder should be run and operated by the Madras State Transport Department ;
>
> And whereas the State Transport Undertaking having prepared a scheme for the purpose, as set out in the Schedule hereunder, the same is hereby published for the information of the public, as required under section 68-C of the Motor Vehicles Act, 1939 (Central Act IV of 1939)."

Then follows the scheme. The scheme is published under the subscription T.V. Venkataraman, Director, Madras State Tranpsort Department. It is contended for the petitioners that by reason of the definition of *State Transport Undertaking* found in section 68-A of the Act, the State Government as the undertaking should form the requisite opinion set out in the preamble to the notification before initiating the scheme and prepare the scheme, and that it has not been so done. It is said that the Director of the State Transport Department only had the requisite opinion, and prepared the scheme, and for that he had no legal sanction. It is argued that the various particulars required under the scheme are matters which should be decided in the case of any particular route only by the Minister-in-charge of the subject under the allocation of the business of the State by rules made under Article 166 (3) of the Constitution and that no such decision had been taken by the concerned Minister. Another objection taken is that under Article 166 (1) and (2) of the Constitution all executive action of the Government shall be expressed to be taken in the name of the Governor and orders and instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor. It is submitted that the Director of the State Transport Undertaking is not a Secretary, Deputy Secretary or an Assistant Secretary of the concerned department and so under the relevant rules is not entitled to initiate the proposed scheme by notification in the Gazette. In the first counter-affidavit dated 12th September, 1967 filed on behalf of the first respondent which has been adopted for the State of Madras impleaded as the second respondent, the petitioners, premises that the State Government must take the requisite opinion under section 68-C of the Act for

initiating a nationalisation scheme under the provisions of Chapter IV of the Act is questioned. A definite stand has been taken by the respondents that what is required under section 68-C is that the State Transport Undertaking must form an opinion, and that it is unnecessary at the stage of initiation of the scheme, to refer to the Minister or the Government. It is stated that Article 166 of the Constitution is not germane to the issue at the stage when a scheme has been published calling for objections, and that the final decision alone is required to be taken by the Government. In the language of the counter-affidavit sworn to by the Director of the State Transport Department.

"The day-to-day administration of the State is carried on through the Heads of Department and their subordinates........

The Director of the State Transport Department, namely the 1st respondent, is the Head of the Department. Consequently he is the chief executive officer of the State Tranpsort Undertaking of the Madras State and he is, therefore, competent to formulate and publish the schemes under section 68-C of the Act. In the context of the Act the State Transport Undertaking has to publish the scheme of nationalisation and the State Government has to approve it. In the instant case the Madras State Transport Department has published the scheme following the general policy of the Government. It is therefore, not necessary at this stage to refer to the Minister or the Government. Neither the Government nor any Minister can be construed as a State Transport Undertaking under this section."

After arguments commenced in these cases on the 19th October, 1967, the cases had to be adjourned for short intervals at the request of Counsel on either side or to facilitate the respondents in placing before the Court record of all relevant proceedings prior to the actual publication of the scheme. A number of counter-affidavits have been received from the respondents and a further affidavit has been filed for the petitioners. All the affidavits were permitted by us, as we felt after hearing the arguments of learned Counsel for the petitioners on the 19th, that the stand taken for the respondents may not be tenable, and that the Advocate-General may better examine whether factually the Director had been authorised by the Government to formulate the scheme. The affidavit on behalf of the petitioners sworn to on the 6th November and of the first and second respondents sworn to on the 7th November, 1967 are in substantial agreement in setting out the circumstances in which the several subsequent affidavits came on record. But it is necessary for us to refer to one matter in regard to which there is apparent divergence. In the counter-affidavit of the Director, dated 7th November, 1967 filed as counter to the affidavit of the petitioner, dated 6th November, 1967 the first respondent states that it is totally incorrect on the part of the petitioner to state in his affidavit that the Advocate-General admitted that neither the concerned Minister nor the concerned Secretary had arrived at any opinion under section 68-C. This is with reference to the averment in the affidavit for the petitioners to the effect that the learned Advocate-General admitted that neither the concerned Minister nor the concerned Secretary had arrived at any opinion under section 68-C, as it was the Director, who alone was competent to form an opinion. In our view, the difference in the versions is merely apparent and it is all just semantics. In the affidavit of the first respondent it is admitted that the Advocate-General argued to the effect that it would be sufficient compliance with the requirements of section 68-C if the statutory authority, namely, the Director, the Madras State Transport Department had formed the opinion and that it was not necessary for either the Minister or the Secretary to the Government to form the opinion under section 68-C. Admittedly, it is not the case of the respondents that either the concerned Minister or the concerned Secretary arrived at the opinion required under section 68-C for initiating the scheme in question. No such case has been put forward or made out by record. Necessarily on the record the Advocate-General had to state that he was not resting on the opinion of any concerned Minister or Secretary arrived at in terms of section 68-C. With reference

to facts not contended for and not established when their existence is in issue, it matters little whether there is concession of their non-existence or just non-committal silence. So far as the Court is concerned the facts simply do not exist.

Consequent on the remarks made by Court during the hearing of the cases, certain facts which preceded the publication of the scheme on the 26th day of July, 1967 have been placed before Court by the respondents. In his affidavit, dated 20th October, 1967, Thiru T. N. Lakshminarayanan, Secretary to the Government of Madras, Industries, Labour and Housing Department, dealing with the matter relating to the nationalisation of bus transport at the Secretariat level, stated that the Madras State Transport Department is a department of theGovernment of Madras and that the Director is the head of the department. It is averred in the affidavit that as the head of the department he exercised certain powers. It is not stated in the affidavit whether as the head of the department the Director has been authorised or empowered to formulate schemes of nationalisation of bus transport under section 68-C and publish the same. But the affidavit brings out that the State Government has been following a policy of progressive nationalisation of passenger transport and issuing Government orders from time to time. It is stated that in G.O.Ms. No. 195 (Transport), Industries, Labour and Co-operation, dated 12th January, 1961, the Government laid down the policy for operation of long distance express buses by the Madras State Transport Department on routes over 120 miles, that recently the State Government considered carefully the question of extension of this policy, and in modification of the policy the Government issued an order G.O.Ms. No. 2007, Transport, dated 17th June, 1967. A copy of this Government Order has been filed as annexure to the affidavit. We shall be referring to this Government Order later.

A supplemental affidavit, dated 30th October, 1967 was filed by this Secretary. This affidavit brought out certain further proceedings that preceded the publication of the impugned notification. By G.O.Ms. No. 2008 (Transport), Industries, Labour and Housing, dated 17th June, 1967, the Government of Madras directed that an *ad hoc* committee be constituted to work out the details in all aspects for implementing the policy decision taken in G.O.Ms. No. 2007 above referred to. This committee is a broad based one representing several departments of the Government with the Secretary to the Government, Industries, Labour and Housing Department, as the chairman. This committee was required to submit its report within a fortnight. It is set out in the affidavit that the secretary of the committee requested the Director, the Madras State Transport Department, to submit a note on the points which may be placed before the committe for discussion, and that the Director submitted on 17th June, 1967 a note to which was appended a list of routes whose permits expired in the course of 1967-68. The Director appears to have represented that in view of the large number of routes and having regard to the clear directive in the policy order, G.O.Ms. No. 2007, dated 17th June, 1967 instead of obtaining administrative approval in each case on nationalisation separately he may be given general permission to nationalise the routes whose permits expired in the interval. The committee in its proceedings at the meeting held on 24th June, 1967 accepted the proposal of the Director that he be authorised to nationalise the routes as and when the permits of the private operators expired and send for the information of the Government monthly reports. The Secretary states in his affidavit, dated 30th October, 1967 that by his letter, dated 4th July, 1967, the first respondent was informed that his request for permission to publish the scheme of nationalisation in respect of the routes covered in G.O.Ms. No. 2007 without prior approval was agreed to by the Government and that he should take action accordingly. The original file containing the proceedings was produced before us later on our directions. It is seen that after the proceedings of the committee held on 24th June, 1967 the Secretary had a discussion of the matter with the concerned Minister, the Minister for works, and the Minister endorsed the grant of permission to the Director of the State Transport Department to publish the scheme of nationalisation covered by G.O.Ms. No. 2007 without prior approval of the Government. On this the Secretary sent a demi-official letter to the Director of the State Trans-

port Department, the letter, dated 4th July, 1967 referred to above, intimating him of the grant of the required permission and asking him to take action accordingly. We then have the impugned notification in the Gazette on 26th July, 1967, Copies of the related proceedings G.O. Ms. No. 2008, dated 17th September, 1967, the note of the Director of Madras State Transport Department requesting a general order permitting him to nationalise the routes whose permits expire in the course of the financial year and a list of routes whose permits expired in 1967-68 submitted by him, the proceedings of the *ad hoc* committee held on 24th June, 1967, the note of the Secretary, dated 4th July, 1967 which was endorsed by the concerned Minister and the demi-official letter, dated 4th July, 1967 by the Secretary to the Director of the State Transport Department are all now on record.

Initially there was a claim for privilege for production of the aforesaid documents, though reference had been made in the counter-affidavit for the respondents to the contents of the documents except of the note of the Secretary, dated 4th July, 1967 and of the fact of endorsement of the same by the Minister. Copies of the documents referred to above when required by Counsel for the petitioners were not supplied, the learned Advocate-General claiming privilege and submitting that he could not give copies of the documents. The claim of privilege was not made in proper form. That apart privilege is claimed in respect of contents of documents and not the paper on which they are written. When the contents of the documents have been disclosed and set out in the affidavits, we see no purpose in the plea of privilege. A matter in respect of which privilege is claimed and sustained cannot be on the record and cannot be brought in as evidence in the case. But the respondents disclosed the contents of all but one of the documents in their affidavits. The contents were disclosed voluntarily for their own case. Mr. M. K. Nambiyar for the petitioners referred to In re, *Hinchliffe a Person of Unsound Mind, Deceased*[1], and submitted that irrespective of any question as to discovery, property, or privilege, if a document was made an exhibit to an affidavit, any person who had the right to inspect and take copies of the affidavit has a similar right as to the exhibit also. It was argued that the documents referred to in the affidavit formed as much part of the affidavit as if they had been actually annexed and filed with it. It is, however, unnecessary to dwell on the claim of privilege as copies of all documents referred to in the affidavit, dated 30th October, 1967 were furnished later on 3rd November, 1967 and the relevant file was placed before the Court. In this background the petitioner in Writ Petition No. 2303 of 1967 in his affidavit, dated 6th November, 1967 has gone to the extent of making the charge that the documents in question would not have been in existence on the dates on which the earlier affidavits had been filed. This charge has naturally evoked the two lengthy counter-affidavits, dated 7th November, 1967 already referred to one for each of the respondents repudiating the suggestion of the petitioner. In their anxiety to absolve themselves from charges of change of case and shifting of the defence base, the respondents in their affidavits would avoid reliance on further proceedings now brought out in evidence in support of their case and would state that all these materials were produced either in answer to the queries or out of deference to the remarks of this Court. The Director of the State Transport Department in his affidavit, dated 7th November, 1967, states :

> "The Court also remarked that in the interest of the parties it would be better, that all the relevant documents are placed before the Court for its perusal. The stand of the State throughout has been based on the notification published in *Fort St. George Gazette*, dated 26th July, 1967, and therefore, the statutory authority, as distinct from Government could form the opinion and publish schemes under section 68-C of the Act. All the necessary materials were produced either in answer to the queries of the Court or out of deference to the remarks of the Court."

1. (1895) 1 Ch. D. 117.

While we are satisfied, having perused the original file and having regard to the course of events, that the petitioners charge, that these documents could not have been in existence earlier is wholly unfounded, we cannot understand the attitude of the respondents, their disclaimer of reliance on the subsequent proceedings for validating the impugned notification. One can understand a party litigant suspecting the prior existence of the documents when there was no mention of them earlier, copies of the documents were refused while their contents were relied on, and the scrutiny of the originals even by his Counsel withheld, particularly when at that stage there could be apprehension that the documents may turn the scale against his contention. But we are unable to appreciate the reluctance on the part of the respondents in referring to the proceedings that preceded the impugned notification and making them part of the record. Even in the counter-affidavit, dated 7th November, 1967, filed for the second respondent there is a claim of privilege in respect of what may be of some assistance to the respondents, the note of the Secretary, dated 4th July, 1967, which was endorsed by the concerned Minister. In paragraph 6 of his counter-affidavit, the Secretary states:

"The decision of the Government upon which the D. O. letter, dated 4th July, 1967 came to be issued is a confidential document made to me in official confidence. I submit the public interests would suffer by its disclosure. Therefore I claim privilege for the said document 'containing the decision of the Government."

The learned Advocate-General, when his attention was drawn to this paragraph, submitted that the claim for privilege may be ignored. A copy of the note which carries the endorsement of the Minister has since been supplied to the petitioners, and the note also forms part of the record. Having regard to the hesitancy exhibited by the respondents in producing the documents and making them part of the record and their assertion even in the last of their counter-affidavits leading to an impressions that these documents, were not produced in support of their case but out of deference to the remarks of this Court, I for my part feel that the respondents' case should be confined to and considered on the defence first put forward and persisted in right through, namely, that it is not necessary for either the Minister or the Secretary to the Government to form an opinion under section 68-C. But *ex facie* public interests are involved and it is that feature that made us despite some opposition from the petitioners to permit the respondents to support the impugned notification on all available grounds. The Secretary in his last affidavit states that the Minister in charge of works is the concerned Minister who deals with transport including Motor Vehicles Act and nationalised transport, and that is the Minister that had formed the necessary opinion. It is stated that the opinion having been formed the Director of the State Transport Department had been asked to take action accordingly. In the context the reference can only be to the decision stated to have been taken by the Government on 4th July, 1967 evidenced by the endorsement of the Minister on the note of the deponent in respect of which privilege was claimed in the affidavit and later waived. As the documents have ultimately become part of the record and the Advocate-General also addressed arguments based thereon we shall examine also whether the impugned notification could be sustained by reference to these proceedings. But it has to be recorded that there is no claim apart from the proceedings now brought out into the record that either the concerned Minister or the Secretary formed the requisite opinion under section 68-C. For the petitioners it is submitted that it is the Minister to whom the subject, Motor Vehicles Act, has been allotted under Article 166 (3) by rules made by the Governor who has to take the decision, that the opinion must be formed by the Minister himself, and that there cannot be an *ad hoc* authorisation to any other person to form the opinion. It is stated that there was actually no delegation of power under section 68-C to form the requisite opinion, and that section 68-C does not contemplate any delegation of that function.

It will be convenient to set out the factual position as now crystallised leading to the impugned notification. On the 17th of June, 1967 the Government issued G.O. Ms. No. 2007 which according to the respondents is only a policy decision but enough for guidance. On this policy decision the Government constituted an *ad hoc* committee to work out details in all aspects for impelementing the policy decision. To this *ad hoc* committee the Director of the State Transport Department submitted a note appending thereto a list of routes whose permits expired in the course of 1967-68, making proposal that without taking prior administrative approval of the Government he may nationalise the routes and send monthly reports to the Government. This permission sought by the Director of the State Transport Department for nationalisation of the routes falling under the policy decision of the Government without prior approval of the Government was agreed to by the Government and the Director was asked to take action accordingly. In pursuance of this authorisation the Director has taken action and published the scheme. It is not claimed that the draft schemes as finalised for publication were submitted to the Minister or Secretary of the concerned department for approval before publication under section 68-C. The impugned notification, the preamble of which has already been set out, does refer to the formation of the requisite opinion by the State Transport undertaking. It is in the form prescribed. The notification is issued by the Director, who it is stated is the chief executive officer of the undertaking. The questions that fall for decision on these facts are: (*i*) Whether as contended for the respondents the Director of the State Transport Department was himself competent to validly formulate and publish the scheme under section 68-C and whether it was unnecessary at the stage of initiation of the scheme to refer to the Minister or the Government; and (*ii*) if the Director by himself has not the legal authority to formulate and publish the scheme, whether the scheme published can be considered valid as one duly authorised by the Government by delegation or otherwise.

A point has been taken for the petitioners that the Minister for Works who has endorsed the proposal for action being taken by the Director in the matter of nationalisation of the routes in question without prior administrative sanction of the Government, is not the appropriate Minister. It is stated that it is the Minister to whom the subject, Motor Vehicles Act, has been allotted under the rules of business made by the Governor of Madras under Article 166 (3) of the Constitution who has to take the decision under the Act. A distinction is sought to be made between the subject *Nationalised Transport* and the subject *Motor Vehicles Act*. The Secretary to the Government of Madras, Industries, Labour and Housing Department has categorically stated in his counter affidavit, dated 7th November, 1967 that the Minister in charge of Works is the concerned Minister who deals with transport including Motor Vehicles Act and nationalised transport. Having heard both Counsel on this point, we accept his statement that it is the concerned Minister who made the endorsement. Whether the endorsement is sufficient to clothe the Director of the State Transport Department with power to formulate the scheme under section 68-C is quite a different matter.

There has been no argument before us that the formation of the requisite opinion under section 68-C is not a condition precedent for a valid formulation and publication of the scheme. There can be no dispute that the opinion required is the subjective opinion of the undertaking, for that is the section. The question is, who has the legal authority to form the opinion for the undertaking—is it Thiru Venkataraman, the Director or the State Government? The preamble to the published scheme refers to the existence of the opinion in the undertaking and factually the opinion in respect of the published scheme was that of the Director only. If the Director as not the appropriate authority to form the opinion, the proposal would lack legal competency and further steps thereunder would be wholly incompetent and without jurisdiction. A reading of Chapter IV-A would show that the undertaking before propounding the scheme determines on the scheme on objective criteria. On a duly published scheme under section 68-C objections are invited from persons affected by the scheme. A judicial approach to the consideration of

the scheme in the light of the objections is provided under section 68-D and the affected parties could lead evidence and make their submissions and it is that scheme proposed which ultimately on approval after the enquiry under section 68-D with modifications, if any, that is finalised. A finalised scheme could confer a monopoly on the State undertaking to the exclusion, complete or partial of private operators. For assuming that monopoly and driving out private operators from the field Chapter IV-A postulates certain conditions. To keep the undertaking within bounds and provide against arbitrary action an effective machinery is set up in Chapter IV-A. In that context it is extremely important that every decisive step in the process has to be in strict conformity with law.

As we have stated at the outset, our learned brother Kailasam, J., has taken the view that the impugned notification is in accordance with the provision of section 68-C. It looks to us that the matter is covered by the authority of the Supreme Court in *Kalyan Singh's case*[1], for a decision the other way and the question cannot be considered *res integra*. The learned Judge also refers to the decision of the Supreme Court but finds support there for his view. The question, there for, calls for careful consideration. Machinery or nationalisation of transport services is provided or under Chapter IV-A of the Motor Vehicles Act, 1939. Section 133-A enables a State Government, for the purpose of carrying into effect the provisions of the Act, to establish a motor vehicles department and appoint as officers thereof such persons as it thinks fit. Schemes for road transport service by States popularly referred to as nationalisation of road transport service are prepared and published under section 68-C. Section 68-D provides for finalisation of the scheme after hearing objections. We may here set out both section 68-C and 68-D.

"68-C. Where any State Transport Undertaking is of opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinated road transport service, it is necessary in the public interest that road transport services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the State transport undertaking whether to the exclusion, complete or partial, of other persons or otherwise, the State transport undertaking may prepare a scheme giving particulars of the nature of the services proposed to be rendered the area or route proposed to be covered and such other particulars respecting thereto as may be prescribed, and shall cause every such scheme to be published in the official gazette and also in such other manner as the State Government may direct."

"68-D. (1) Any person affected by the scheme published under section 68-C may, within thirty days from the date of the publication of the scheme in the official gazette, file objections thereto before the State Government.

(2) The State Government may, after considering the objections and after giving an opportunity to the objector or his representatives and the representations of the State transport undertaking to be heard in the matter, if they so desire, approv or modify the scheme.

(3) The scheme as approved or modified under sub-section (2) shall then be published in the official gazette by the State Government and the same shall thereupon become final and shall be called the approved scheme and the area or route to which it relates shall be called the notified area or notified route:

Provided that no such scheme which relates to any inter-State route shall be deemed to be an approved scheme unless it has been published in the official gazette with the previous approval of the Central Government."

Under section 68-C the State Transport Undertaking forms the opinion that for the purpose of providing an efficient, adequate, economical and properly co-ordinate road transport service it is necessary in the public interest that road transport

1. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183, 1187.

services in general or any particular class of such service in relation to any area or route or portion thereof should be taken by the State Transport Undertaking, whether to the exclusion, complete or partial, of other persons or otherwise and then prepares a scheme giving particulars of the nature of the services proposed to be rendered, the area or route proposed to be covered and such other particulars respecting thereto as provided in the rules. The undertaking thereupon causes the scheme to be published in the official gazette and also in such other manner as the State Government may direct. Under the first part of the section the opinion is formed that it is necessary in the public interest that the road transport services should be run and operated by the undertaking for the purpose of providing an efficient, adequate, economical and properly co-ordinated service. Under the second part of the section the scheme is prepared giving particulars. Then the prepared scheme is cause to be published. Then the State Government comes on the scene as a supervisory authority and functions as a *quasi judicial* tribunal, between the undertaking and the affected parties. Section 68-D authorises the State Government to receive objections to the scheme and after considering the objections giving an opportunity to the objectors and the representative of the undertaking to represent their respective case, to approve or modify the scheme. The State Government may also reject the scheme proposed. A scheme which is approved or modified is published in the official gazette as *approved scheme* and thereupon it becomes final. An inter-State route does not become an approved scheme unless it has been published in the official gazette with the previous approval of the Central Government. Section 68-C and section 68-D bring out prominently that the Act contemplates the State Transport Undertaking as a distinct entity by itself, it is made a statutory authority. But a reference to the definition of the expression *State transport undertaking* would show that it is in reality a sheath put on a transport enterprise run by the State or under the control of the State for the purpose of chapter IV-A. The State Transport Undertaking gets defined by section 68-A (*b*) for the purpose of Chapter IV-A, thus:

" State Transport Undertaking means any undertaking providing road transport service, where such undertaking is carried on by—

(*i*) the Central Government or a State Government;

(*ii*) any Road Transport Corporation established under section 3 of the Road Transport Corporations Act, 1950;

(*iii*) the Delhi Road Transport Authority established under section 3 of the Delhi Road Transport Authority Act, 1950;

(*iv*) any municipality or any corporation or company owned or controlled by the State Government."

The word *undertaking* ordinarily means any business or project undertaken, that is, an enterprise. When a State Government or the Central Government carries on Road Transport Service, it would be a State Transport Undertaking for the purpose of Chapter IV-A, that is a transport enterprise by the State or Central Government is a State transport undertaking. An autonomous Road Transport Corporation formed under section 3 of the Road Transport Corporations Act, 1950, or any corporation or company controlled by the State Government or any municipality when running transport service would also be a State Transport Undertaking. It follows from this definition that the Madras State Transport department, a department of the State Government, of which Thiru T. V. Venkataraman is the Director and stated to be the Chief Executive Officer is a State Transport Undertaking for the purpose of Chapter IV-A.

The question as to who may initiate the scheme where the undertaking is a department of the Government came up for consideration before the Supreme Court in *Kalyan Singh's case*[1], above referred to. In that case the scheme under section 68-C proposing nationalisation was issued by the State Government. Objec-

1. (1963) 1 S.C.J. 50: A.I.R. 1962 S.C. 1183, 1187.

tions to the scheme under section 68-D were heard by the Joint Secretary, Judicial department of the Government, and finally approved by him, and the approved scheme notified in the Gazette. The contention taken in that case by the affected transport operators was that it was the undertaking that had to form the requisite opinion and prepare the scheme for nationalisation and publish it in the prescribed manner, and that as the State Government initiated the scheme, it was not validly made. For the State it was contended that a transport undertaking run by a State Government was a State Transport Undertaking and that, therefore, the scheme initiated by the State Government which ran the State undertaking was a scheme initiated by the State undertaking. This contention was accepted by the Supreme Court. One of the main points urged by the private operators in that case was that the underlying scheme of the Act which provided for objections by the aggrieved parties before the State Government, hearing of both the private operators and the undertaking and approving or modifying the scheme, could not be worked out unless a clear distinction and well marked dichotomy was observed between the State Transport Undertaking and the State Government. The Supreme Court, after pointing out that in the case of an undertaking run by a State Government there was some overlapping of functions, observed that the anomalous position may in practice be avoided by the State Government creating a department to be in charge of the undertaking and hearing objections and approving or modifying the scheme in a manner without violating the principles of natural justice. On the question as to whether the State Government can form the opinion the position was formulated thus:

"The statutory authority created is an undertaking run by a State. The State can only run an undertaking through its officers; it may entrust the conduct of the transport service to a particular officer or to a department of the State; in either event, it is the State Government that runs the undertaking. The *statutory authority, namely, the State Transport Undertaking, has to form an opinion within the meaning of section 68-C of the Act and the opinion must necessarily be tha of the Government which runs it.* If the State Government running an undertaking forms an opinion, it can, legitimately be said that the statutory authority, *i.e.*, the State Transport Undertaking, has formed the opinion................

If a State directly runs an undertaking, it can only be through a department. In law, there cannot be any difference between an undertaking run by a department of a State Government and that run by the State Government. In either case the undertaking is run by the State and that undertaking is a State Transport Undertaking within the meaning of section 68-C of the Act...

The opinion must necessarily be formed by somebody to whom under the rules of business, the conduct of the business is entrusted and that opinion, in law, will be the opinion of the State Government. It is stated in the counter-affidavit that all the concerned officials in the Department of Transport considered the draft scheme and the said scheme was finally approved by the secretary of the Transport Department before the notification was issued. It is not denied that the secretary of the said department had power under the rules of business to act for the State Government in that behalf. We, therefore, hold that in the present case the opinion was formed by the State Transport Undertaking within the meaning of section 68-C of the Act, and that there was nothing illegal in the manner of initiation of the said scheme (italics is ours)"

To us it appears after this specific and positive pronouncement of the Supreme Court that the opinion of a State Transport Undertaking must necessarily be that of the State Government, which runs it; the question raised in the present cases does not call for further debate. But our learned brother Kailasam, J., considers that this pronouncement would not apply to the instant case and distinguishes that case observing:

"In this case the notification is under section 68-C by the State Transport Undertaking and the difficulty that arose in the case before the Supreme Court by the issue of the notification under section 68-C by the State Government does not arise."

Before the learned Judges, the respondents had not then filed their counter-affidavits and we do not know the exact stand taken by them at that interlocutory stage. The learned Judge proceeds to observe :

> " In repelling the contention that the opinion of the State Government is not the opinion of the State Transport Undertaking, the Court observed that the opinion of the State Government can be legitimately said to be that of the State Transport Undertaking. This decision in my view, does not support the contention of the learned Counsel for the petitioner. On the other hand, it supports the stand of the Government that the Act envisages State Transport Undertaking which can be a department of the State Government as different from the State Government."

In our view, the distinction misses a vital point. When their Lordships of the Supreme Court observed that the opinion of the State Transport Undertaking must *necessarily be that of the Government* which ran it, they were enunciating a juristic principle that in the State Government was located the power and authority to form the requisite opinion for the statutory entity, the State Transport Undertaking. To say that the State Government must form the opinion or make the decision wherever an opinion or decision of the State Transport Undertaking is called for is not to ignore that the Act contemplates two distinct entities—the State Transport Undertaking and the State Government. It is localising the decision making faculty of the undertaking, speaking figuritively, legally locating the brain or mind of the undertaking. Where a State directly runs an undertaking, as pointed out by the Supreme Court, it can only be through a department of the Government or a particular officer. The overlapping of functions on the one hand and the necessity for preserving the principles of natural justice on the other when the State Government functions as qusai-judicial authority under section 68-D between the undertaking and the private operators, cannot affect the legal concept underlying the principle enunciated by the Supreme Court that the opinion of the statutorily defined undertaking must necessarily be that of the State Government which runs the undertaking. The anomaly of the State Government being the proposer of the scheme and the judge of its validity, it has been noticed by the Supreme Court in several cases, could be avoided in practice by suitable provisions in the exercise of the dual functions of the Government. This aspect will become clear if we examine the position with reference to other Transport Undertakings that fall within the definition of *State transport undertaking* in section 68-A (*b*)—Say a transport undertaking by a Road Transport Corporation established under section 3 of the Road Transport Corporations Act, 1950, or by a municipality or a corporation or company owned or controlled by the State Government. The expression *State transport undertaking* is the nomenclature given under Chapter IV-A to an enterprise defined therein. If an autonomous corporation or company owned or controlled by the State Government or a municipality runs a Transport Service, it would be a State Transport undertaking. When such State Transport Undertaking has to form an opinion or take a decision the opinion has necessarily to be formed or decision necessarily taken by the corporation, company or municipality as the case may be. Though the opinion or decision is taken by the municipality or corporation or company and there is none else to take it, it will be the opinion of the State Transport undertaking for the purpose of Chapter IV-A. The position cannot be different if the enterprise is of the State Government. So when the opinion is formed or decision taken by the State Government, it will be the opinion or decision of the State Transport Undertaking for the purpose of Chapter IV-A.

Chapter IV-A does not give the undertaking a constitution of its own locating the seat of the power to take a decision or form an opinion. The body running the service, whether it is a company, corporation, municipality or the Government, will have to form its opinion according to the rules governing its constitution. If it is a company, its decision or opinion is formed according to the articles of the company. A Road Transport Corporation established under section 3 of the Road Transport Corporation Act, 1950, is a body corporate having perpetual succession and a common seal. It has its own constitution and its opinion or decision must be formed according to the provisions of the Act. A municipality's decision is taken according

to the provisions of the Act governing the municipality. When so formed, for the purpose of section 68-C, the opinion or decision of any of these bodies would be that of the State Transport Undertaking which would be under the definition in section 68-A. Even so when a State Government maintains a department for providing Road Transport Service, even though the State Department would fall within the definition of State Transport Undertaking, the legal persons of the department is the State Government itself and its acts and decisions have to conform to the business rules of the Government. The Motor Vehicles Act under Chapter IV-A, when personifying the several transport undertakings referred to in section 68-A (*b*) as distinct statutory entities under the style State transport undertaking, has not disturbed the situsof its opinion forming or decision taking organ ; it remains where it was. Impersonal bodies can function only through the machinery and in the manner prescribed by their law and constitution.

In *Kondala Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], where a scheme was published by the Chief Executive Officer of the Andhra Pradesh State Road Transport Corporation, a body corporate having perpetual succession and common seal, it is observed by the Supreme Court :

> " The Chief Executive Officer has no power under the Act to frame a scheme. Section 68-C empowers only the State Transport Undertaking to prepare a scheme and cause every such scheme to be published in the official Gazette and also in such other manner as the State Government may direct. The scheme, therefore need not be directly published by the Corporation, but may cause it to be published in the official Gazette. The Act of publishing in the official Gazette is a ministerial act. It does not involve any exercise of discretion. It is only a mechanical one to be carried out in the course of day to day administration. So understood, there cannot be any difficulty in holding that it was purely a ministerial act which the Chief Executive Officer by reason of the aforesaid resolution can discharge under section 12 (*c*) of the Road Transport Corporations Act. It must be presumed for the purpose of this case that the Corporation decided the terms of the proposed schemes and the said decision must have been duly authenticated by the Chairman or any other member authorised by the Corporation in this behalf and the Chief Executive Officer did nothing more than publish the said scheme in exercise of its administrative functions."

Only on the presumption that the scheme had been prepared in the manner authorised for the corporation, the publication of the scheme by the Chief Executive Officer was upheld. Section 68-C empowers the State Transport Undertaking to cause the scheme to be published in the official Gazette. The act of publication was considered to be a purely ministerial Act. But the Chief Executive Officer, it is said, could not himself frame a scheme. Only the corporation could frame its scheme but that can only be in accordance with its constitution.

Referring to the same Andhra Pradesh State Road Transport Service in *C.S. Rowjee* v. *State of Andhra Pradesh*[2], the Supreme Court observed :

> " Under section 68-C of the Motor Vehicles Act it is the Corporation which is the State Transport Undertaking which has to form the opinion whether ' for the purpose of providing an efficient, adequate, economical and properly co-ordinated Road Transport Service it is necessary in the public interest whether the services should be run and operated by the State Transport Undertaking'. Secondly, it is the Corporation that has to be satisfied that such services should be in public interests be provided for any area or route."

Mutatis mutandis where the transport undertaking is caried on by the State Government it is the State Government which is the State Transport Undertaking which has to form the requisite opinion under section 68-C.

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1. (1961) 1 S.C.R. 642 : (1963) 1 M.L.J. (S.C.) 111 : (1963) 1 An W.R. 111 : (1963) M.L.J. (Crl.) 226 ; (1963) 1 S.C.J. 539 : A.I.R. 1961 S.C 82, 91.
2. (1964) 6 S.C.R. 330 : A.I.R. 1964 S.C. 962, 968.

For the petitioners reference was made also to *Kashi Prasad* v. *R.T. Authority*[1]. It is needless to refer in detail to this decision after the exposition of the law by the Supreme Court in *Kalyan Singh's case*[2]. There also the notifications under section 68-C referred to the requisite opinion being that of the State Government. We may, however, refer to the following passage in *Kashi Prasad* v. *Road Transport Authority*[1]:

> "It is not anybody's allegation that any independent authority, in the shape of a corporation, has been established by the State Government under section 3 of the Road Transport Corporation Act, 1950. There is no company or corporation also operating these services which can be said to be controlled or owned by the State Government. The Transport Department of the Government, is, on the other hand, providing and operating these services."

Even so here the State transport department is not an autonomous body with power to make decision of its own ; it remains a department of the Government. It is the State Government that runs the undertaking, though for administrative purpose there is a separate department in charge of the service. In law the department can function only as Government, and its business is the business of the Government.It is this feature that makes all the difference and though the presence of this feature necessitates making due provision for the State Government to function under section 68-D as a quasi-judicial authority when the scheme comes up for consideration and approval, under the Act as it stands, the initiation of the scheme has to be by the Government, that is, as the State Government running the undertaking.

The learned Advocate-General drew our attention to certain passages in *G. Nageswara Rao* v. *Andhra Pradesh State Road Transport Corporation*[3]. It is stated therein :

> "We therefore hold that the Road Transport Department of the Andhra Pradesh Government is a State Transport undertaking under the Central Act and therefore it was within the legal competence to initiate the scheme."

Proceeding further the question was posed whether the State transport undertaking formed the opinion before preparing the scheme and causing it (to be) published in the official Gazette. That scheme which was published was signed by Guru Prasad, General Manager, State Transport Undertaking, Andhra Pradesh Road Transport. The preamble to the scheme incorporated the first part of section 68-C, that is, a scheme was proposed for the purpose of providing an efficient, adequate, etc. transport service, in the public interest. The word *opinion* was omitted. The Supreme Court observed :

> "The State Transport Authority can frame a scheme only if it is of opinion that it is necessary in public interest that the Road Transport Service should be run or operated by the Road Transport Undertaking. When it proposes, for the reasons mentioned in the section, a scheme providing for such a transport undertaking, it is a manifest expression of its opinion in that regard. We gather from a reading of the scheme that the State Transport Undertaking formed the necessary opinion before preparing the scheme and publishing it. The argument of the learned Counsel carries technicality to a breaking point and for the aforesaid reasons, we reject it."

The question in the present case is not as to whether an opinion has been formed, but whether the appropriate authority has formed the opinion and initiated the scheme. The objection here taken is not one of form but of substance. No doubt a contention was raised before the Supreme Court in that case that the general manager for the State Transport Undertaking had no authority to do so on its behalf. The Supreme Court observed that it was a question of fact and should have been raised specifically in the petition. It was not overruled as a highly technical objection not affecting the validity of the initiation. It was stated :

1. A.I.R. 1961 All. 214, 217.
2. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183, 1187.
3. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : A.I.R. 1959 S.C. 308, 319, 320, 321.

"It was not the case of the petitioners that even if he had been appointed as Manager of the Andhra State Transport Undertaking, he would have no authority to frame and publish a scheme on behalf of that undertaking. The petitioners cannot at this stage be allowed to challenge his authority to do so, when they did not specifically raise this point in their petitions."

Another case relied upon for the respondents *Krishnayya* v. *State of Andhra Pradesh*[1], does not help the respondent and further it is of doubtful authority. The following observations therein, in our view, go against the current of authority in that regard:

"Here, no such considerations pertain to the initiation of a scheme under section 68-C. As the opinion to be formed is a private one, it is not a condition precedent to the exercise of its monopoly."

Nor does the case *Messrs. Samarth Transport* v. *Y.B. Chavan*[2], advance the defence. In that case it was held that the undertaking admittedly belonged to the Government and the activity of the Government in carrying on the undertaking was under the administration of the department for Transport. The question was whether the Chief Minister could be regarded as a person who had proposed the scheme of Road Transport Service. It had been provided that it was the Chief Minister who had to hear and decided objections to the scheme. It was held that the Chief Minister was not the head of the transport undertaking and could not be regarded as a person who proposed the scheme of Road Transport Service. We do not have details as to the constitution of the department. Apart from this fact, the question in the form now appearing before us was not under consideration in that case. In fact for the Transport Service it was stated that the Government of Bombay themselves were not the State Transport undertaking, and that the statuory authority had its board of management consisting of both official and non-official members and also a General Manager authorised and empowered to carry out its functions and duties. The other citation for the respondents on this part of the case *Birajmohan Das Gupta* v. *The State of Orissa*[3], is of no help. In that case a notification under section 68-C was issued by the Transport Controller in charge of the State Transport Undertaking. An argument was raised that the notification did not show that it was the State Transport Undertaking which was satisfied that it was necessary to take action under the section, as the notification referred only to the opinion and satisfaction of the Transport Controller. The point was not taken in the petitions and the Supreme Court did not examine the position. Their Lordships of the Supreme Court said that it was a question of fact and should have been specifically pleaded in the petitions so that the State may have been able to make a reply, and that in the absence of any averment on the question of fact they were not prepared to allow the petitioners to raise the point in arguments.

In this state of authorities, we feel bound by the decision of the Supreme Court in *Kalyan Singh's case*[4]. We cannot distinguish that case as arising out of a case where the State Government had formed its opinion and that opinion was challenged. To distinguish in that manner would be to make a distinction without any difference. The power to form an opinion or take a decision in a given matter cannot normally vest at the same time in two different entities. Clearly in this case the State Government could have formed its opinion and framed a scheme differing in material particulars from the scheme now proposed. The validity of such a scheme, if published by the Government, has to be conceded in view of *Kalyan Singh's case*[4]. If the contention of the respondents is to be accepted, there can be two rival schemes, one by the Director of the State Transport Department and the other by the Government prepared and published according to the rules governing Governmental business. Which of these schemes has to be construed as the scheme prepared in accordance with law? The answer has to be that in matter of this kind there cannot be two

1. (1958) 2 An.W.R. 211 : A.I.R. 1959 A.P. 292, 302.
2. I.L.R. (1960) Bom. 978.
3. (1962) 1 S.C.R. (Supp.) 681.
4. (1963) 1 S.C.J. 50 : A.I.R. 1962 S.C. 1183, 1187.

bodies both competent to initiate the same matter. We are not considering the probability of such conflict arising. We are only considering the utter untenability of the claim that independent of the Government the head of the State Transport Department as now constituted can himself validly frame and publish a scheme.

We shall next consider whether the scheme prepared and published by the Director of the State Transport Department as the head and Chief Executive Officer of the department could be considered to be the scheme of Government. The Government carries on its business and functions according to the Madras Government Business Rules and Secretariat Instructions. Article 154 of the Constitution vests executive power of the State in the Governor, and it shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution. Article 154 (2) provides that such vesting does not prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor. Section 3 (60) of the General Clauses Act which is applicable in the interpretation of the Constitution by virtue of Article 367 (1), defines a *State Government* as the Governor in a State.. While Article 166 (1) provides that all executive action of the Government of a State shall be expressed to be taken in the name of the Governor, clause (3) of the Article provides that the Governor shall make rules for the more convenient transaction of the business of the Government of the State and for the allocation among the Ministers of the said business in so far as it is not business with respect to which the Governor is by or under the Constitution required to act in his discretion. The statutory functions of the State Government would also be functions of the Governor for allocation of business under Article 166 (3), The Madras Government Business Rules and Secretariat Instructions framed in exercise of the powers conferred by clauses (2) and (3) of Article 166 of the Constitution defines, *Secretary* to mean a Secretary to the Government of the State and includes an Additional Secretary, a Joint Secretary and a Deputy Secretary to the Government of the State. Rule 4 dealing with allocation and disposal of business provides that the business of the Government shall be transacted in the departments specified in the first schedule and shall be classified and distributed between those departments as laid down therein. Rule 5 provides for the Governor on the advice of the Chief Minister, to allot the business of the Government among the Ministers by assigning one or more departments to the charge of a Minister. Under rule 6, each department of the Secretariat shall consist of a Secretary to the Government, who shall be the official head of the department, and of such other officers and servants subordinate to him as the State Government may determine. Except the Legislative Assembly and the Legislative Council more than one department may be placed in charge of the same Secretary and the work of a department other than the Legislative Assembly and the Legislative Council departments may be divided between two or more Secretaries. Under rule 7 the Council of Ministers constituted under Article 166 (3) is held collectively responsible for all executive orders issued in the name of the Governor in accordance with the rules, whether such orders are authorised by an individual Minister on a matter appertaining to his portfolio or as a result of discussion at a meeting of the Council or otherwise. Under rule 9, without prejudice to the provisions of rule 7, the Minister in charge of a department shall be primarily responsible for the disposal of the business appertaining to that department. Coming to the departmental disposal of business, it is necessary to refer to rules 21 and 22 in particular. Under rule 21 except as otherwise provided by any other rule, cases shall ordinarily be disposed of by or under the authority of the Minister in charge who may by means of standing orders give such directions as he thinks fit for the disposal of cases in the department. Copies of such standing orders should be sent to the Governor and the Chief Minister. Rule 22 provides that each Minister shall by means of standing orders arrange with the Secretary of the department what matters or classes of matters are to be brought to his personal notice. Copies of such standing orders shall be sent to the Governor and the Chief Minister. As we have accepted the affidavit of the Secretary to the Government of Madras, Industries, Labour and Housing Department, that business, relating to the Motor Vehicles Act

and Nationalised Bus Transport are attended to by the Minister for works under whom he is working, it is unnecessary to refer to the allocation of business among the Ministers.

Now the Governor in whom the executive business of the State vests, had made rules enabling the Minister in charge of a particular department to dispose of the cases before him and also authorise him by means of standing orders to give such orders as he thinks fit for the disposal of the cases in the department. The respondents, in spite of their attention being drawn to the necessity for standing orders for disposal of cases in the department, have not produced any standing orders. We may also point out that it is not claimed that the Director *ex-officio* or otherwise has the status of the Secretary of the department. Our attention has not also been drawn to any rules of business or standing orders under which the Director of the State Transport Department has been authorised to deal with this matter. At the moment we are not on the question of the validity, if any, of such rule. The Governor exercises the executive power of the State only through his Ministers and other Officers subordinate to him. But the subordinate officers may act and discharge the functions of the Government only on being duly authorised in accordance with the rules of business framed under Article 166 of the Constitution. Of course, the functions may be conferred by law on any subordinate authority under Article 154 (2) (*b*). Legislative power in relation to the matter now under consideration being available under Entry 35—mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied, and Entry 21—commercial and industrial monopolies, combines and trusts, in List III. Neither the statutory authority under Article 154 (2) (*b*) nor the power under the business rules framed under Article 166 (3) could be strictly called delegated powers. It was having regard to this aspect of the matter that we asked the Advocate-General to find out whether in the constitution of the transport department of the State the requisite authority for the Director to act under section 68-C could be found. No materials have been placed before us for an inference in favour of the department. The respondents do not base the authority of the Director to initiate the scheme on the Rules of Business of the Government or on any legislation under Article 154 (2) (*b*). In his counter affidavits, dated 20th October, and 7th November, 1967 the Secretary to the Government only states that as head of the department the Director exercises certain powers. It is not stated that he has been specifically invested with the powers required for forming an opinion and framing a scheme under section 68-C. The mere fact that he is the chief executive officer of the transport department of the Government, does not enable him to act as if he were the Government. That is not the way that Government business is done in a democratic State.

Referring to the proceedings prior to the actual publication of the scheme, the learned Advocate-General submittted that the notification of the Government, dated 17th June, 1967, G.O.Ms. No. 2007 (Transport) could itself be considered as the expression of the requisite opinion of the Government. This notification no doubt proceeds as by the order of the Governor and is subscribed by the Secretary to the Government of the concerned department. But this notification by itself can, by no stretch of reasoning, be regarded as publication of the scheme in the official Gazette contemplated under section 68-C. First, it is not-and it cannot be claimed, that it itself is the scheme. The learned Advocate-General would submit that it is the core of the scheme and the scheme published has only worked out the details of the scheme of notionalisation suggested in the said Government order. But in his affidavit, dated 7th November, 1967, the Director avers with reference to G.O. Ms. No. 2007 as follows :—

"G.O.Ms. No. 2007 was used as annexure in order to put it on record that the Government had issued the necessary Government Order which only stated a policy decision, which policy decision was enough guidance. This again was filed into Court only in order to show that the Government has taken a decision to nationalise the routes falling under certain categories."

A policy decision broadly setting out the policy in regard to nationalisation of transport service is not the same thing as the precedent opinion called for under section 68-C for putting a draft scheme. This Government order varied a prior policy decision. To accede to the argument here considered and hold that setting out of guidelines in broad outline would be sufficient compliance, will be to permit inroads on the safety provided for private operators under section 68-C. Section 68-C is not concerned with the general policy decision for nationalisation. Nationalisation scheme has to be implemented and initiated by the undertaking when it is of opinion that for the purpose of providing an efficient adequate economical and properly co-ordinated Road Transport Service it is necessary in the public interest that the Road Transport Services in general or any particular class of such service in relation to any area or route or portion thereof should be run and operated by the undertaking. It has further to consider then whether the service should be to the exclusion, complete or partial of other persons or otherwise. Rule 294-C framed by the Government under section 68-(I) providing for rules being made by the State Government for the purpose of carrying into effect the provisions of Chapter IV-A, requires that every scheme for Road Transport Service and every scheme proposing notification of an approved scheme prepared by the State Transport Undertaking shall be published by the State Transport Undertaking in a particular form. Schedule I of the form contains 18 columns to be considered. Due compliance with the rules and the forms are statutory requirements. It is manifest that these particulars are required to be set out in the proposed scheme, so that the transport operators running vehicles on the routes might know whether they would be affected by the scheme and if they have grounds, may prefer objections to the scheme within the time provided.

In *Kondala Rao* v. *Andhra Pradesh State Road Transport Corporation*[1], the validity of a nationalisation scheme was attacked on the ground of bias. It was *inter alia* contended that a sub-committee consisting of Ministers, Secretaries and officers of the connected department and presided over by the Minister in charge of transport decided that under the scheme of nationalisation of bus service the State Government would take over the bus service in West Godavari and Guntur districts, and that, therefore, the Minister in charge of the portfolio having pre-determined the issue disqualified himself to decide the issue between the State transport undertaking and the private operators. The enquiry under section 68-D in that case was held by the Minister in charge of the portfolio, the transport corporation being represented by its chief executive officer and its legal advisers. After pointing out that the State Government in deciding the dispute between the undertaking and the operators of private buses was only dischargeing its statutory function, and coming to the question of bias on the part of the Minister, it was said by the Supreme Court:

> "The fact that he presided over the sub-committee constituted to implement the scheme of nationalisation of bus services in the West Godawari District does not in itself establish any such bias..
> Even if the sub-committee came to such a decision, it is not possible to hold that it was a final and irrevocable decision in derogation of the provisions of the Act. It was only a policy decision and in the circumstances could only mean that the sub-committee advised the State Government to implement the policy of nationalisation of bus services in that particular district. The said decision could not either expressly or by necessary implication involve a pre-determination of the issue; it can only mean that the policy would be implemented subject to the provisions of the Act."

It is clear from these observations of the Supreme Court that a mere policy decision cannot be considered to be the formation of the requisite opinion under section 68-C. If it had been the determination required under section 68-C, the Minister would have been disqualified.

The constitution of the committee under G.O. No. 2008 and the subsequent proceedings leading to the authorisation of the Director to nationalise the routes

1. (1963) 1 S.C.J. 539 : (1961) 1 S.C.R. 642 : A.I.R. 1961 S.C. 82, 90.

without prior approval of the Government nowhere fall within the scheme of allocation or authorisation of Government business considered above. True it would be impracticable to expect the Minister in person to attend to the various details or even the Secretary of the department himself to examine the necessary satistics and reports and formulate the draft scheme. In a modern welfare State with its multifarious activities, a Minister cannot be expected to discharge all his portfolio work personally. Such a requisite would bring public work to a standstill. He may have to depend on his subordinates to a large extent, but disposition of work must be according to law. In this case it might have been sufficient if the draft scheme worked out in detail had been before publication submitted to the Government for its approval and the Government had approved the scheme and authorised its publication. The committee constituted under the aforesaid Government order was asked to submit a report within a fortnight. We do not know the nature of the report that was submitted. All that we have on record is that the Director suggested that he may have, so to say a *carte blanche*, to nationalise all the routes which belong to the specified categories permits of which expired in the course of the financial year 1967-68. He wanted to be excused from submitting individual proposals in respect of the routes for the administrative approval of the Government. It does not appear from the record that details of the scheme promulgated were brought even to the notice of the committee. The only statistics which the Director appears to have submitted to the committee, as seen from the record, is a list of routes whose permits expired in the course of the year 1967-68., with mileage, number of buses and dates of expiry. The various particulars that had to be filled or considered in preparing a scheme in terms of the form prescribed by the rules must in the circumstancse all have been the subject of the deliberations of the Director. The Secretary got the Minister's endorsement only to the proposal of the Director that he may be permitted to nationalise the scheme in respect of the routes covered by G.O.No. 2007 without the prior administrative sanction of the Government. The question is whether this authority could amount to a valid delegation of the power to form the requisite opinion and frame the scheme.

Mr. M.K. Nambiyar, learned Counsel for the petitioners, submits that when by statute a power is conferred on an authority to form a subjective opinion in a matter, the power must be exercised by that authority and no other. It is said that there can be no valid delegation of such power in the absence of express statutory authority. Our attention is drawn to *Wade's Administrative Law*, where it is stated at page 51 :

> " More obvious cases of illegal delegation occur where the power is conferred upon some particular body, and without any statutory authority they allow some officer or employee to exercise it."

As an authority for this proposition *Allingham* v. *Ministry of Agriculture and Fisheries*[1], is given, where it was held that a statutory power delegated by a Minister to a local agricultural executive committee could not be delegated to an officer responsible to that committee. Lord Goddard C.J., said in that case at page 781 :

> " In this case, it seems to me that the committee left to some one the duty of deciding that which the regulation, which has the force of a statute, requires them to decide for themselves."

The learned Author states that the rule must always apply unless it is expressly excluded, or unless, on a true construction, the delegate is within the statutory description of the persons authorised to wield power. Our attention is also drawn to the following passage in *Garner's Administrative Law*, at page 112 :

> "The Courts will also insist that a discretion entrusted by Parliament to a particular administrative agency is exercised by that agency itself, unless the enabling statute has also expressly conferred on the agency a power to delegate the right to a decision. Where a power to delegate exists any exercise of that power by

1. (1948) 1 All E.R. 780.

the delegating authority and any exercise of the right to decide by the delegate, must be exercised strictly in accordance with the terms of the statute."

The learned author summing up the cases where the maxim *delegatus non potest delegare* applies, states that the maxim applies in short to all persons who are empowered by a statute to do anything and the prohibition on delegation of a discretionary power even applies in case where the delegating authority simply agrees to abide by some other persons' decision. The following passage in the judgment of the Supreme Court in *Commissioner of Police, Bombay* v. *Gordhandas Bhanji*[1], is also relied on for the petitioners :

"It is clear to us from a perusal of these rules that the only person vested with authority to grant or refuse a licence for the erection of a building to be used for the purpose of public amusement is the Commissioner of Police. It is also clear that under rule 250 he has been vested with the absolute discretion *at any time* to cancel or suspend any licence which has been granted under the rules. But the power to do so is vested in him and not in the State Government and can only be exercised by him at his discretion. No other person or authority can do it.".

Learned Counsel contends that it is left to the discretion of the Government to nationalise routes or not, that it is a power statutorily conferred, to be exercised on the subjective opinion of the Government, and that if that power is to be exercised by another or there is to be delegation of that power it can only be in accordance with the provisions of distribution of functions of the Government or under authority of law. Chapter IV-A does not empower any delegation. The director of the Madras State Transport could be vested with the power under section 68-C by statute but such statute is not there. Therefore, it is said the proposed scheme is void and cannot be taken up for consideration under section 68-D. In the context of the submissions the decision of the judicial Committee in *King Emperor* v. *Sibnath Banerji*[2] on appeal from the the Federal Court may also be usefully referred to. That was a case where in relation to a statutory power of delegation, the provisions of sections 49 and 59 of the Government of India Act, 1935, which were incidentical terms with the provisions of Article 166 of the Constitution which we are considering, came up for consideration. Section 2 (5) of the Defence of India Act, 1939 enabled the Provincial Government to delegate any power conferred on it by rules under the Act. Under rule 26, the Provincial Government, if it was satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the defence of India, public safety, etc., it was necessary to do so, might make an order *inter alia* directing that he be detained. The specific power of delegation was not exercised in the case under consideration; but the Governor as the Provincial Government was not personally satisfied as to the matters set out in rule 26. Referring to rule 26, the majority of the Judges of the Federal Court held that the Governor must be personally satisfied as to the matters therein set out, and that in view of the admission by the Crown that in none of the cases before them had the Governor himself considered the case, the orders for detention were not in conformity with the rule. But the learned Chief Justice disagreed and held that the power of delegation was supplementary and afforded no ground for excluding the ordinary methods by which the provincial Government's executive business as authorised to be carried on by the Government of India Act. The Privy Council accepted the opinion of the learned Chief Justice. After referring to the rules of business framed by the Governor of Bengal under section 59 (3) corresponding to Article 166 (3) of the Constitution and the broad scope of the expression *executive action*, the Judicial Committee observed at page 221 :

"It is for the same reason that their Lordships are unable to accept the respondent's contention, also agreed to by the majority Judges in the Federal Court, that the provision of sub-section (5) of section 2, of the Defence of India Act

1. (1951) S.C.J. 803 : (1952) S.C.R. 135 : (1952) 65 L.W. 212, 215.

2. (1945) F.C.R. 195 (P.C.) : (1945) F.L.J. 222 : (1945) 2 M.L.J. 325.

provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add, on this contention, that sub-section 5 of sub-section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under section 49, sub-section (1), of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name."

This decision is clear authority for the position that functions or duties vested in the State Government by a statute may be exercised by subordinates, where there is statutory power of delegation or there has been due authorisation under the rules of business framed under Article 166 (3). The Governor may allocate such statutory functions including matters to be dealt with under the subjective satisfaction of the Government to the Ministers by making rules under Article 166 (3). The Minister in charge may, under standing orders provide for disposal of the cases in his department. When there is no provision under law for delegation and the power is vested in the Government, the Government business rules have to be followed for the due exercise of the powers. Subordinate officers may be authorised only in accordance with the rules of business framed under Article 166 and not otherwise, authorisation by statute being another available way. In the present case admittedly the scheme finalised for publication was not placed before the concerned Minister for his approval; nor is it claimed that a Secretary of the concerned department empowered understanding orders accepted the scheme for publication under section 68-C. The stand taken by the Director is that it was unnecessary at the stage in question to refer to the Minister or to the Government, and that Article 166 of the Constitution is not germane to the issue. The contention is that only a final decision has to be taken by the Government and that will be done later at appropriate stage. This being the stand taken by the department and as the stand cannot be sustained in law, it is needless to labour further on the matter. There has been a serious misconception in the matter and in the result the conditions precedent for the initiation of the scheme are totally absent in this case. The appropriate authority had not formed the requisite opinion before preparing the scheme; nor did the appropriate authority prepare the scheme for its valid publication. The scheme as prepared and published lacks legal sanction behind it and the further proceedings on such a scheme, inviting objections from parties affected and judicial enquiry thereon are futile proceedings wholly devoid of jurisdiction. It follows that the petitioners are entitled to the relief of prohibition they have prayed for.

This does not preclude the undertaking from taking the scheme and re-publishing it, if it gets the Government's endorsement that in the Government's opinion for the purpose of providing an efficient adequate, economical and properly co-ordinated Road Transport Service it is necessary in the public interest that a scheme in the terms proposed should be put into operation. In law the initiation of the scheme should be by the State Government which runs the undertaking for the undertaking. As at persont placed the Director could only recommend to the Government the scheme he draws up for the Government's consideration under section 68-C. We have not considered the objections to the scheme on the merits and on its details. All other questions except those that we have taken up for discussion are left open. In our view, the initiation of the scheme is bad and not in accordance with the statute. It is not a mere technical defect but goes to the root of the jurisdiction. In the Government of a welfare State necessarily, under innumerable Acts, orders, rules and regulations in quick succession, a variety of authorities get vested with wide powers affecting the citizen. New statutory bodies come into existence. In this complex it is normally difficult to know whether these authorities and bodies are functioning in accordance with law or not, but indubitably it is of paramount importance that they act strictly in accordance with the powers entrusted to them. Therefore, it is the duty of the Court to see that they do so and correct transgressions when brought to its notice.

In the result writ of prohibition will issue in the several cases directing the respondents to forbear from taking further steps pursuant to the Gazette notification, dated 26th July, 1967 under section 68-C in Chapter IV-A of the Motor Vehicles Act, 1939. The writ petitions are accordingly allowed. As, Writ Appeal No. 326 of 1967 arises out of an interlocutory order no separate orders are necessary thereon. They are dismissed as unnecessary. Writ Appeal Nos. 329, 352 to 354 and 359 to 361 of 1967 all arising out of final orders refusing prohibition have also to be and are, therefore, allowed. Costs of the petitioner is Writ Petition No. 2303 of 1967 only allowed.

Nationalisation Writs.

In the light of the separate judgments just delivered by us, and, on the grounds exhibited there, we direct the following disposals.

Writ Appeal No. 326 of 1967 which is strictly confined to an appeal from an order in an interlecutory proceeding before Kailasam, J., will be dismissed as infructuous. Writ Appeal Nos. 329, 352 to 354 and 359 to 361 of 1967 will be allowed as substantially they involve the same relief of the issue of a writ of prohibition sought for in the vast majority of the Writ Petitions before us.

Writ Petition Nos. 2735 and 2812 of 1967 will also be allowed along with the writs relating to prohibition, namely, Writ Petition Nos. 2303, 3063, 3064, 2780, 2785, 2786, 3038 to 3040, 3094 and 3268 of 1967, as they are for the issue of writs of *certiorari* substantially for quashing the present scheme as lacking in jurisdiction.

Writ Petition Nos. 2664, 2665, 2734, 2881, 2785, 2787, 2892, 2906, 3054, 3182, 3260 and 3285 of 1967 which relates to prayers either for the issue of writs of *mandamus* to direct the Regional Transport Authorities to consider and allow the applications for renewal of permits or for temporary permits of private stage carriage operators on the routes, for the issue of writs of *certiorari* will be segregated and not dealt with as part of these proceedings and posted before us separately for disposal.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

M. Ramu and another .. *Petitioners**.

v.

The Government of India, represented by the Secretary, Ministry of Finance, New Delhi, and others .. *Respondents*

Banking Laws (Amendment) Act (LVIII of 1968), *section* 36-*AD—Constitutional validity—If opposed to Article* 19 (1) *of the Constitution of India.*

Words and Phrases—Demonstration—Meaning of.

Section 36-AD of the Banking Laws (Amendment) Act, 1968, which was brought into force from 1st February, 1969, is not violative of the fundamental rights of the citizen's freedom of speech and expression guaranteed under Article 19 (1) of the Constitution of India. The section is intended to prevent only violent forms of demonstration or speeches that are likely to undermine the confidence of the depositors. The safeguards provided in sub-section (2) of the section clearly shows that the penal provisions are attracted only in cases where contravention of the provisions of sub-section (1) of the section is without reasonable excuse. The provisions of the section would squarely fall within the scope of the exceptions provided for in Article 19 (2) and (3) of the Constitution.

It is no doubt true that a perfectly peaceful demonstration, such as wearing badges, would not come within the mischief of the section as it is not violent nor is it in any way calculated to prevent the transaction of the normal business of the banking company.

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* W.P. Nos. 504 and 505 of 1969. 20th February, 1969.

The word 'demonstration' means a visible communication of one's ideas to others to whom it is intended to be conveyed and it is in effect a form of speech or of expression.

Kameswar Prasad v. *State of Bihar*, A.I.R. 1962 S.C. 1166 ; *Punjab National Bank Ltd.* v. *All India Punjab National Bank Employees Federation*, (1960) S.C.J. 999: (1960) 1 S.C.R. 806 : A.I.R. 1960 S.C. 160, referred and explained.

Petition under Article 226 of the Constitution praying the High Court to issue writs of *mandamus* declaring the provisions of section 36-AD of the Banking Companies Regulations Act, 1949 as unconstitutional and illegal and forbearing respondent from enforcing the provisions of section 36-AD of the Amendment Act of 1968 against the petitioners.

B. R. Dolia, for Petitioners.

The Court made the following

ORDER.—W.P. No. 504 of 1969 is filed by an employee of the Indian Overseas Bank Ltd., Madras, and W.P. No. 505 of 1969 by an employee of the State Bank of India, Madras, for the issue of writ of *mandamus* to strike down the provisions of section 36-AD of the Banking Laws (Amendment) Act, 1968, as unconstitutional and illegal.

The Government of India introduced in Parliament Banking Laws Amendment Bill on 23rd February, 1967. The Bill mentioned several objects for its introduction, viz., (1) to snap or at least to make ineffective the link between a few industrial houses and the banks, (2) to change the exclusive orientation of the Banks towards industry and business and to re-orient credit facilities to several priority sectors such as agriculture, Small-scale Industries, rural finance, co-operation and exports, (3) to arrest monopolistic trends of the investment of funds of the Banks and mis-direction of bank's resources, and (4) to ensure that the credit decisions of the management of Banking companies conform with the plans for economic development. The Bill was passed by the Parliament and received the assent of the President of India on 2nd February, 1969 and was brought into force throughout India from 1st February, 1969. The petitioners submit that the provisions of clause (*a*) to (*c*) to sub-section (1) of section 36-AD are violative of the fundamental rights of the petitioners and as such void. The impugned sub-section may be set down below:

"*Section* 36-AD (1) No person shall—

(*a*) obstruct any person from lawfully entering or leaving any office or place of business of a banking company or from carrying on any business there, or

(*b*) hold within the office or place of business of any banking company, any demonstration which is violent or which prevents, or is calculated to prevent, the transaction of normal business by the banking company, or

(*c*) act in any manner calculated to undermine the confidence of the depositors in the banking company."

The attack against sub-section (1) is stated as follows: The section as amended prohibits peaceful picketing, satyagraha and holding of peaceful demonstrations of Bank employees if they result in obstruction of any person from lawfully entering or leaving any office or place of business of the company or from carrying on any business there or prevent the transactions of normal business of the Banking company. The petitioners claim that the right conferred under Article 19 (1) of the Constitution on the citizen to have the right of freedom of speech and expression and to assemble peaceably could be affected if they are prevented from peacefully picketing or holding peaceful demonstrations if they result in obstruction of any person from lawfully entering the premises. I am unable to construe that the right of freedom of speech and expression or the right to assemble peaceably would include the right to obstruct a person from entering into the place of business to which he has got a right to enter. The learned Counsel for the petitioners in support of his contention that their fundamental rights to demonstrate cannot in any way be curtailed, referred to the decision of the Supreme Court reported in *Kameswar Prasad* v. *State of*

Bihar[1], where the Court held that a demonstration such as was prohibited by the impugned rule may be of the most innocent type—peaceful, orderly such as the mere wearing of a badge by a Government servant or even by a silent assembly, say outside office hours, demonstrations which could in no sense be suggested to involve any breach of transquility. The Court in explaining what the word "demonstration" meant observed that it is a visible communication of one's ideas to others to whom it is intended to be conveyed and it is in effect a form of speech or of expression because speech need not be vocal since signs made by a dumb person would also be a form of speech. As the demonstration is a form of speech it was submitted that freedom of speech or of expression cannot in any way be curtailed. The learned Judge added that from the nature of things a demonstration may take various forms; it may be noisy and disorderly, for instance, stone throwing by a crowd. This is not guaranteed under fundamental rights. The Court held that if the rule was framed as to single out those types of demonstrations which were likely to lead to a disturbance of public tranquility, demonstration will not be protected. The question that was being considered by Supreme Court was the validity of rule 4-A of the Bihar Government Servants Conduct Rules, 1956, which prohibited the Government servants from taking part in any demonstrations or any form of strike in connection with any matter pertaining to his conditions of service. This 'blanket ban' the Court held was not valid, but specifically observed that if the demonstration was likely to lead to disturbance of public tranquility, it will not be protected. This decision instead of supporting the contention of the petitioners negatives their plea. The petitioners cannot claim any right to demonstrate outside the premises which would result in an obstruction and prevention of any person seeking to do business with the bank from doing so. The provisions in sub-clause (*a*) cannot, therefore, be challenged as being violative of the fundamental rights conferred under the Constitution. So far as sub-clause (*b*) of section 36-AD (1) is concerned, it prohibits a person from holding, within the office or place of business of any banking company, any demonstration which is violent or which prevents, or is calculated to prevent, the transaction of normal business by the banking company. The attack on this sub-clause is on the ground that the right to hold any demonstration which is guaranteed under the Constitution is curtailed. The learned Counsel submitted that a perfectly peaceful demonstration by the demonstrators wearing black badges may result in persons seeking to do business with the bank being prevented and therefore violative of their fundamental rights. What the sub-clause seeks to prevent is a demonstration which is violent or which prevents or is calculated to prevent the transaction of the normal business by the banking company. A perfectly peaceful demonstration by wearing black badges would not come within the mischief of this sub-clause; for, that is not violent; nor would it in any way prevent or is calculated to prevent the transaction of the normal business by the banking company. The learned Counsel referred to the decision in *Punjab National Bank Ltd.* v. *All India Punjab National Bank Employees Federation*[2], and submitted that in industrial law a peaceful pen-down strike is not an offence and that therefore such a demonstration could not be made punishable. In the case cited it was held that where a person participates in a pen-down strike, it cannot be said that he had the requisite intention to commit criminal trespass. But it was also made clear that the intention of the person who resorted to pen-down strike had to be gathered from the circumstances of the case. For instance, if in resorting to pend-down strike, the persons started shouting slogans or in any other way caused annoyance to the management, the offence of criminal trespass may be made. What the decision of the Supreme Court above referred to has laid down is that a peaceful pen-down strike would not be a criminal trespass or an offence under the Industrial Disputes Act. This would not in any way help the petitioners in this case, as the section makes a demonstration punishable only if it is violent or when it prevents or is calculated to prevent the transaction of the normal business of the banking company. Prevention of normal transaction of business by the banking

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1. A.I.R. 1962 S.C. 1166.
2. (1960) S.C.J. 999 : (1960) 1 S.C.R. 806 : A.I.R. 1960 S.C. 160.

company by violence or acts calculated to prevent the transaction would in all probability lead to a disturbance of the public tranquility. A customer of the Bank may be badly in need of some money and proceeding to the Bank, and if he is obstructed or if by violent demonstration or otherwise prevented from transacting his normal business, a protest is mostly likely. The provisions that are found in sub-clauses (*a*) and (*b*) would squarely fall within the scope of exceptions provided for under Article 19 (2) and (3) of the Constitution of India. That the attack on the constitutional validity of sub-clauses (*a*) and (*b*) is without substance is made clear by the provisions made in sub-section (2) of section 36-AD which provides that contravention of the provisions of sub-section (1) without reasonable cause alone is made punishable. The penal provision can only be effected if the acts specified in sub-section (1) are committed without reasonable cause. The existence of sub-section (2) to section 36-AD renders the attack on sub-section (1) futile.

Sub-section (*c*) of sub-section (1) of section 36-AD prohibits a person from acting in any manner calculated to undermine the confidence of the depositors in the banking company. The validity of this sub-clause was challenged on the ground that the right of freedom of speech in criticising the affairs of the banking company would be adversely affected. The sub-clause cannot be understood in the manner sought to be construed by the learned Counsel for the petitioners. What is prohibited is any adverse act calculated to undermine the confidence of the depositors of the banking company without any reasonable excuse. The Legislature cannot be denied its right to protect the interests of the bank without prejudice to the right of freedom of speech. "Freedom of speech" would not include acting in a manner calculated to undermine the confidence of the depositors of the banking company without any reasonable excuse. That the act of speeches that are made is punishable only when it is made without reasonable cause is made specific in sub-section (2) of section 36-AD which provides that whoever contravenes any provision in sub-section (1) without any reasonable excuse shall be punishable. This provision amply safeguards the right of freedom of speech of the petitioners regarding the affairs of the bank.

Lastly, the learned Counsel submitted that the preamble and the objects of the Amending Act do not justify the provisions of section 36-AD. A copy of the objections and the preamble to the amending Act was not placed before me. But the learned Counsel relied upon his statement in his affidavit in paragraph 2. Accepting his statement as correct, the objects that are mentioned relate to snapping or at least making ineffective the link between a few industrial houses and the banks, changing the exclusive orientation of the banks towards industry and business, arresting monopolistic trends of the investment of funds of the Banks and ensuring the credit decisions of the management of banking companies conform with the plans for economic development. Even accepting the contention that the impugned sub-clauses would not fall within the objects of the amending Act, the validity of the clauses cannot be questioned as it is within the scope of the legislative competence of the Parliament and is not in any way violative of the fundamental rights conferred on the citizens. In the result, I am unable to accept any of the grounds urged by the learned Counsel for the petitioners. The writ petitions are dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI AND MR. JUSTICE K. S. PALANISWAMI.

Manikka Narasimhachari .. *Appellant**

v.

M. V. Ramasubbier and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Wrongful sale of trust property—Suit for cancellation of sale deed and for restoration of property to alienating trustee—Sanction under section 92 if necessary—Expression "vesting any property in a trustee" in section 92 (3)—Meaning of.

Trust—Power of trustee to alienate trust property—Scope and extent.

When there is a wrongful alienation not binding upon the trust and when the alienating trustee still functions as a trustee and has not been removed, it will be open to the worshippers or the beneficiaries to maintain a suit for possession of the trust property after declaring the alienation invalid; when such possession is asked for, the decree for possession will be in favour of the alienating trustee himself. Section 92, Civil Procedure Code, is not applicable to such a suit.

The words "vesting any property in a trustee" have a definite connotation and section 92 (3), Civil Procedure Code, will apply only to cases in which either a trustee is first appointed or an old trustee is removed and a fresh trustee is appointed and the trust property is vested in such a trustee. Restoration of possession of the property to the trustee from the alienee to whom the property has been alienated wrongfully is not vesting of the property in a trustee under clause (3) of section 92.

The managing member or the trustee is not entitled to sell the property merely because the price fetched is attractive or for the purpose of investing the price with a view to get larger income than derived from the property itself.

It is now settled by judicial decisions that the words "benefit to the estate" have to be understood in a liberal sense as opposed to earlier narrow view that it must be of defensive character calculated to protect the estate from some threatened danger or destruction. The proper test is, whether the transaction could be upheld as an alienation by a prudent owner with the knowledge that is available to him at the time of the transaction. When once the test to be applied is that of a prudent owner, the question whether the transaction is beneficial to the estate must necessarily depend upon the facts and circumstances of the particular case.

Appeal against the decree of the Sub-Court, Madurai, in O.S. No. 99 of 1960.

R. Gopalaswami Ayyangar and *K. Parasaran*, for Appellant.

V. S. Rangaswami Ayyangar, for Respondents.

The Judgment of the Court was delivered by

Ramamurti, J.—The second defendant in O.S. No. 99 of 1960 on the file of the Subordinate Judge, Madurai is the appellant. The ancestor of the parties was one Manicka Sankaranarayana Iyer, who died in 1928, leaving behind him five sons, (*a*) one Venkatachalam Iyer, the father of the first plaintiff, (*b*) Ramudu Iyer, the father of plaintiffs 2 to 5, (*c*) one Ramakrishna Iyer, the first defendant (his sons being defendants 2, 4 and 5), (*d*) Narasimhier, the third defendant and (*e*) one Lakshmana Iyer, since dead, whose widow is the sixth plaintiff. This Manicka Sankaranarayana Iyer was conducting charity and Annadanam trust and certain other charities and in order to secure efficient and proper performance of the charities, the ancestor, Manicka Sankaranarayana Iyer and his sons executed a settlement

*Appeal No. 104 of 1963. 20th February, 1969.

deed marked Exhibit A-1 on 3rd June, 1908. The said deed *inter alia* provides that Sankaranarayana Iyer, the father, should be the first trustee, that after his death the senior-most male member of the family should be the trustee in turns. The present first defendant is now the senior-most male member and is therefore functioning as managing trustee and looking after the trust. Certain properties had been set apart for the maintenance of the father, Sankaranarayana Iyer, during his lifetime and on his death the sons became entitled to those properties. The suit, O.S. No. 46 of 1955, was filed for partition and separate possession of those properties amongst the five branches. A preliminary decree, Exhibit A-7, dated 12th September, 1956, was passed in pursuance of a compromise and a final decree, Exhibit A-2 was also passed on 25th November, 1959. In that partition suit, O.S. No. 46 of 1955, the present first defendant, Ramakrishna Iyer, was the second plaintiff and his son Narasimhachariar, the second defendant in the present action and the appellant herein, was the third plaintiff. A Commissioner was appointed in that suit, the properties to be divided were auctioned and as per the final decree various items of properties were allotted. The final decree contained a provision for payment of the owelty after adjusting the values of the properties allotted to the various branches. The first defendant was allotted item 6 of the 'A' Schedule in that suit which is door No. 48-A, East Avani Moola Street which is the subject-matter in the present suit. This property was auctioned by the Commissioner amongst the members of the family and it was ultimately knocked down in favour of the present first defendant for a sum of Rs. 21,500 his being the maximum bid. Exhibit A-4 dated 19th April, 1959, is the bidders' list which shows that several members of the family participated in the auction, that the first bid commenced with a sum of Rs. 15,000 that after a particular stage the competition was between the third defendant, Narasimhier and Ramakrishna Iyer the first defendant. The third defendant's bid ultimately was Rs. 21,150 over which the first defendant made the final bid of Rs. 21,500 which was accepted and the property also allotted to the first defendant. It is common ground that the funds of the Annadanam trust were utilised to purchase this property, door No. 48-A, though in the beginning the first defendant made the initial 10 per cent deposit of Rs. 2,150 on the day of the auction, and later on reimbursed himself from the trust. It is again common ground that this is trust property belonging to the Annadanam trust and that the first defendant was holding and enjoying the property only as trustee. Under Exhibit B-13 dated 14th July, 1960, the first defendant sold this property as trustee and manager of the trust to his son the second defendant for Rs. 25,000. The sale deed sets out in detail the circumstances under which the trustee or manager of the trust (the first defendant) sold the property to the second defendant. Immediately thereafter, the plaintiffs objected to the sale and notices passed between the parties. The plaintiffs instituted the present action for cancelling the sale deed and for recovery of possession of the suit property from the second defendant and delivery thereof to the first defendant, who as observed is the present managing trustee of the Annadanam trust. The complaint of the plaintiffs is that the suit property would fetch a rent of Rs. 300 per month, that its value will be easily Rs. 35,000 that there was no necessity or benefit for the trustee to sell the property and that the first defendant has clandestinely and fraudulently sold the property to his son, the second defendant for a grossly inadequate price. The further case of the plaintiffs is that the terms of the settlement deed Exhibit A-1, dated 3rd June, 1908, contain a restriction prohibiting the trustee from selling the property and that this sale is highly detrimental and prejudicial to the interest of the trust.

The suit was resisted by the contesting defendants, the trustee—first defendant—and the purchaser the second defendant on the ground that the price for which the property was sold was a fair and adequate price, that the second defendant had purchased door No. 48, property immediately adjacent to the suit property for a price of Rs. 40,000 that disputes had arisen between the second defendant as the owner of door No. 48 and the trust with regard to rights of easement to pass drainage, latrine water, right to light and air, dispute the dividing line etc., and there was also difficulty about light and ventilation for door No. 48-A and the first, and the

second defendants referred the entire matter to the common family lawyer one Mr. Rajagopala Iyengar and that he suggested, as the best solution the sale of door No. 48-A to the second defendant for a price of Rs. 25,000. The further case of the defendant is, that the suit property, 48-A is a very very old house constructed about 100 or 150 years ago, that Nos. 48 and 48-A were originally one single house, that for purposes of partition amongst the members of the family the single house was divided into two houses Nos. 48 and 48-A that No. 48-A was only three-fourths of door No. 48 and that the owner of door No. 48-A will have to suffer several disadvantages and inconveniences in the matter of easementary rights, light, ventilation, dividing wall, want of well and that it is because of those considerations that the family lawyer suggested the sale as the best solution under the circumstances. The family lawyer, Rajagopala Iyengar, was examined as D.W. 3, and he has spoken to all the relevant facts and the background in which the sale deed was executed in favour of the second defendant. A perusal of the judgment of the trial Court shows that the learned Judge had accepted substantially the evidence of Rajagopala Iyengar about his mediation and his *bona fides* in giving the advice which the trustee accepted by selling the property in question. The learned Judge, however, set aside the sale holding that the value of the property will be about Rs. 40,000 and that the price of Rs. 25,000 was not fair but inadequate, that there was no necessity to sell the same and that in any event the terms of the settlement deed contained an embargo against the sale of the property by the trust. Objections raised by the defendants about the frame and maintainability of the suit and about the want of sanction under section 92, Civil Procedure Code, were overruled as lacking substance. In the result the trial Court declared the sale invalid and passed a decree for possession against the second defendant in favour of the first defendant who is the manager or trustee of the trust. Hence the present appeal by the second defendant-purchaser.

When there is a wrongful alienation not binding upon the trust and when the alienating trustee still functions as a trustee and has not been removed, it will be open to the worshippers or the beneficiaries to maintain a suit for possession of the trust property after declaring the alienation invalid; when such possession is asked for, the decree for possession will be in favour of the alienating trustee himself; because so long as he is a trustee he is the only person who is entitled to the lawful possession of the property. The law is well settled and it is too late in the day to question such a right of a worshipper or beneficiary to ask for a decree for possession being passed in favour of the alienating trustee; section 92, Civil Procedure Code, is not applicable to such a suit. Vide *Bishwanath* v. *Radha Ballabji*[1], and the recent decision of Alagiriswami, J., in *Amir Jan* v. *Shaik Sulaiman Sahib*[2], in which there is a detailed discussion of the relevant case law.

Mr. Gopalaswami Iyengar, the learned Counsel for the appellant, then contended that the restoration of possession from the alienee to the trustee would amount to the vesting of the property in the trustee within the meaning of section 92 (3), Civil Procedure Code, and without sanction of the Advocate-General the suit is not maintainable. We see no substance in this contention. The words "vesting any property in a trustee" have a definite connotation and section 92 (3), Civil Procedure Code, will apply only to cases in which either a trustee is first appointed or an old trustee is removed and a fresh trustee is appointed and the trust property is vested in such a trustee. Restoration of possession of the property to the trustee from the alienee to whom the property has been alienated wrongfully is not vesting of the property in a trustee under clause 3 of section 92, Civil Procedure Code. Vide *Johnson D Po Min* v. *U Ogh*[3]. In *Ranchoddas* v. *Mahalaxmi Vahuji*[4], a Bench of the Bombay High Court took the same view (though no reference was made to the Rangoon decision) that a suit for possession against an alienee to whom the trust

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1. (1967) 2 S.C.J. 331 : (1967) 2 S.C.R. 618 : A.I.R. 1967 S.C. 1044.
2. (1968) 2 M.L.J. 559.
3. A.I.R. 1932 Rang. 132 at 136.
4. A.I.R. 1953 Bom. 153.

properties had been wrongfully and unauthorisedly alienated would not be hit by section 92 (3), Civil Procedure Code. Gajendragadkar, J., as he then was, overruled the objection as to want of sanction in these terms at page 157:

"It is, therefore, necessary to consider whether the claim for possession made by the plaintiffs falls within section 92 (1) (c). Mr. Purshottam's argument is that, since the plaintiffs want the properties to be restored to defendant 1, they are virtually asking for an order for vesting the properties in defendant 1. We think that there is no substance in this argument. The plaintiffs do not seek for the removal of defendant 1 from trusteeship; and indeed, they do not seem even to emphasise the wrongful alienations effected by her. They want defendant 1 to continue as trustee and manager of the temple and its properties and according to them the title with regard to these properties which vests in defendant 1 as a trustee has not been validly and effectively divested. There is thus no question of obtaining a decree vesting any property in defendant 1. The relief of possession in the present suit merely amounts to claim for restoring the property to where it still belongs. If that be the true position, there can be no doubt that the suit does not fall under section 92 and that the absence of sanction would not make it incompetent."

The plaintiffs who are the members of the family which founded the trust have got an undoubted right to institute the present suit to protect and safeguard the interests of the trust.

We have carefully considered all the aspects of the matter on the merits of the case and we are not inclined to agree with the view taken by the learned Subordinate Judge.

There is abundant evidence in the case showing that the plaintiffs have instituted the suit not so much out of a genuine desire to redress any wrong done to the trust, and the suit is mainly prompted by ulterior motives and ill-will against the first and the second defendants.

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We are of the clear view that the price fetched at the auction furnishes a safe and reliable data and the price of Rs. 25,000 fixed under Exhibit B-13 is a fair price; if anything it is little higher and certainly not inadequate. Even so, the question still remains whether there are justifying circumstances to uphold the sale in favour of the second defendant.

Learned Counsel on both sides invited our attention to some of the decisions which have dealt with the scope of the powers of the managing member of a joint family or a trustee in the matter of alienation of the property either for benefit or for necessity. It is unnecessary to refer to these cases in detail as it is now settled by judicial decisions that the words "benefit to the estate" have to be understood in a liberal sense as opposed to the earlier narrow view that it must be of defensive character calculated to protect the estate from some threatened danger or destruction. The proper test is, whether the transaction could be upheld as an alienation by a prudent owner with the knowledge that is available to him at the time of the transaction. When once the test to be applied is that of a prudent owner, the question whether the transaction is beneficial to the estate must necessarily depend upon the facts and circumstances of the particular case. Vide statement of the law in Mullah's Hindu Law, 13th Edition, page 276, section 243-A. The managing member or the trustee is not entitled to sell the property merely because the price fetched is attractive or for the purpose of investing the price with a view to get larger income than derived from the property itself. But the sale of unproductive property for an advantageous price or sale of property which is exceedingly difficult of enjoyment has been upheld as being one for the benefit of the estate or the trust. Any enumeration as to what is benefit and what is necessity cannot in the very nature of things be exhaustive and the difficulty is only in the actual application of the test of a prudent owner with regard to individual alienations. In a recent

decision of the Supreme Court in *Balmukund* v. *Kamalwati*[1], the Supreme Court approving the liberal view in *Jagatnarain* v. *Mathurdas*[2], and *Sital Prasad* v. *Ajolal Mander*[3], has held that for a transaction to be regarded as being one for the benefit of the estate it need not necessarily be of a defensive character and the test would be, whether the transaction is one which a prudent owner would enter into in the course of the management with foresight and without being reckless or arbitrary. On the facts of that case, the Supreme Court held that an agreement to sell a fractional share which the family owned in certain lands could not be upheld as there was neither allegation nor proof that the family could not conveniently manage and enjoy the fractional share belonging to the family. We have perused the deed of endowment Exhibit A-1, which contains a specific provision expressly conferring power upon the manager or the trustee for the time being to sell and convert immoveable property of the trust into cash. The trial Court is wrong in thinking that clause 12 of the deed contains an embargo against the alienation of the trust property in favour of any member of the family. That clause merely emphasises that the dedication or the endowment is outright and of an absolute character and the family is not entitled to any beneficial interest and that none of the members of the family or the descendants should use the property for their own benefit. We are not prepared to read this clause as curtailing the express power which has been conferred upon the trustee to alienate or convert immoveable property into cash if he should think it is necessary in the interests of the trust.

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For all these reasons, we uphold the sale. The appeal is allowed and the plaintiff's suit is dismissed with costs in both the Courts. We may also add that the second defendant has offered to pay a sum of Rs. 5,000, to the trust *ex gratia* and we are recording the offer made by his learned Counsel in the course of the hearing. It is hardly necessary to mention that this circumstance did not in any way weigh with us in the conclusion which we have reached on the merits of the case.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

E. C. Muthuswami Gounder .. *Petitioner**

v.

V. K. Chennimalai Gounder .. *Respondent.*

Limitation Act (XXXVI of 1963), *section* 19—*Acknowledgment of debt—Computation of fresh period of limitation—Money sent by postal money order—Relevant date—Date of transmission by post or date of actual receipt by the creditor.*

Section 19 of the Limitation Act, 1963 (corresponding to section 20 of the earlier Act) has two distinct and separate limbs. The first one is that the payment should be on account of a debt and such a payment should constitute an acknowledgment. The second is that such acknowledgment should be in the handwriting of the debtor or the person making the payment under his authority.

Where a debtor seeks the media of the post office for transmission of a payment made by him to the creditor towards a debt due by him, a fresh period of limitation will start from the date of transmission of the money order by post. It is not correct to state that the actual date of receipt of the amount by the creditor should be taken as the starting point for computing the fresh period of limitation. The money order is sent by the debtor not in the abstract but with the sole intention of payment of the same to the creditor towards the debt then subsisting.

1. (1965) 1 S.C.J. 212 : (1965) 1 An.W.R. (S.C.) 6 : (1965) 1 M.L.J. (S.C.) 6 : (1964) 6 S.C.R. 321 : A.I.R. 1964 S.C. 1385.
2. (1928) I.L.R. 50 All. 969 (F.B.).
3. (1939) I.L.R. 18 Pat. 306.

* C.R.P. No. 989 of 1967. 28th March, 1969.

An open payment by a debtor as evidenced by the money order coupon if it is proved by evidence *aliunde* that such payment was intended to be towards the only debt then due by the debtor to the creditor, will be sufficient acknowledgment in writing within the meaning of section 19 of the Limitation Act. It is not necessary that the connection between the payment and the debt should appear on the face of the writing.

M/s. Wazir Sultan and Sons v. *P. S. Rao*, I.L.R. (1959) Mad. 463 : (1959) 2 M.L.J. 244: A.I.R. 1959 Mad. 195, followed.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Sub-Court, Erode, in A.S. No. 320 of 1965—O.S. No. 648 of 1965, District Munsif Court of Erode.

O. V. Balaswamy and *Manicka K. Ramalingam*, for Petitioner.

S. Gopalaratnam and *P. N. Venugopalan*, for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff, aggrieved against the decision of the learned Subordinate Judge, Erode, who dismissed his suit as being barred by limitation, has come up to this Court on revision. The petitioner filed the suit on the foot of a promissory note, Exhibit A-1 and he relied upon a payment of Rs. 100 made by the respondent which was admittedly sent by money order. Exhibit A-2 is the money order coupon for Rs. 100 sent by the respondent. It was sent on 16th July, 1962. It simply shows that a sum of Rs. 100 was sent by the respondent to the petitioner. On a consideration of the merits of the case, the lower appellate Court found that the sum of Rs. 100 was so sent towards the suit promissory note debt and not towards another loan as contended by the respondent. The appellate Court, however, found as a fact that the sum of Rs. 100 sent by money order by the respondent was received by the petitioner on 18th July, 1962 and therefore held that the payment should be deemed to have been made when the money order was received by the petitioner and hence the suit was dismissed as out of time. The lower appellate Court would not accept the contention that the payment made by a debtor in the post office will tantamount to the payment to the creditor and therefore the sending of money order will not save the suit from the bar of limitation. It was of the view that though there was a payment, the acknowledgment if any as evidenced by the money order receipt cannot save the bar since as a fact, the petitioner received the same only on 18th July, 1962. The suit was filed on 10th July, 1965, apparently on the foot that the money order was sent on 16th July, 1962, and that by itself is evidence of payment and hence the suit filed within 3 years from that date would be within time.

Reliance was placed on *Narasinga Rao Garu* v. *Rangayya*[1], wherein the learned Judges were of the view that if limitation is to be saved under section 19, one must be able to read into an endorsement not merely that a payment has been made but that a further sum is admitted to be due. The lower Appellate Court therefore allowed the appeal and set aside the judgment and decree of the trial Court.

Section 19 of the Limitation Act XXXVI of 1963 which is a replica of section 20 of the earlier enactment reads as follows:

" Where payment on account of a debtor of interest on a legacy is made before the expiration of the prescribed period by the person liable to pay the debt or legacy or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of payment of interest made before 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment.

Explanation.—For the purposes of this section (*a*) where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land

1 (1942) 2 M.L.J. 610.

shall be deemed to be a payment; (*b*) 'debt' does not include money payable under a decree or order of a Court."

It has two distinct and separable limbs. The first one is that the payment should be on account of a debt and that such a payment should constitute an acknowledgment. The second is that there should appear by reason of such payment, an acknowledgment in the handwriting of the debtor or the person making the payment under authority. In this case the respondent sent the money order on 16th July, 1962, for onward transmission to the creditor for payment. When a debtor seeks the instrumentality of the post office as media for transmission for payment of a part of a debt admittedly due by him to the creditor then, it is certainly a reasonable inference to draw, that such a payment was not made by him in the abstract but with the sole and only purpose and intention of payment of the same to the creditor towards any debt which was by then subsisting. Mr. Chinnappa, learned Counsel for the respondent states that the payment to a post office ought not to be treated as such because, it cannot be deemed to be a payment to a creditor. He contrasted this state of affairs with a case where a debtor passed on a cheque to the creditor. Cheques also may be handed over in person or sent by post to a creditor. It is not always necessary that when a cheque is received by a creditor, it must be said that it was handed-over to him in person by the debtor. One can easily comprehend a case where a cheque is sent by post just as a money order is sent through post office. In the former case, can it be said that the payment was made by the debtor only on the date when the creditor received the cheque or on the date when he encashed the same? It is by now well settled that if a debtor pays a cheque towards a debt which was not in dispute at that time and there is a delay in the encashment thereof, nevertheless the payment by cheque made by the debtor to the creditor, as evidenced by the cheque, is to be deemed to take effect from the date when the cheque was drawn and posted by the debtor to the creditor. The date when the creditor realises the cheque is of no significance. If this is therefore the principle which has to be applied when payments area made by cheques, I do not see any reason why the same principle should not be made applicable to a case where money is sent through the media of post office. Every one is aware of the form prescribed for sending the money by money orders wherein a debtor subscribes his signature and also signifies therein his assent for the payment of the money so sent by him to the creditor named in that form. This writing in the money order form by itself is an indication that the intention of the debtor, when he transmitted the money by money order, was to pay the same to the named creditor therein. It therefore follows that the money sent under Exhibit A-2, should be deemed to be a payment made by the respondent to the petitioner towards a debt and that having been made before the expiration of the prescribed period by the debtor, a fresh period of limitation shall be computed from the date of transmission which shall be deemed to be the date of payment. In this case the date of transmission is 16th July, 1962.

The other question is whether such an open payment as evidenced in the coupon which is invariably attached to a money order should be deemed to an acknowledgment within the meaning of the proviso to section 19 of the Limitation Act. There is no difficulty in answering this question since the lower Court has found as a fact that the amount of Rs. 100 was sent towards the suit promissory note and not towards any other debt. Such being the case, it is but fair to infer that if a debtor sends moneys towards a particular debt and if by evidence *aliunde* it is proved that such payment was intended to be towards the only debt by then due by the debtor to the creditor, then it falls short of nothing but an acknowledgment. The views of mine as above are supported by a decision of the Division Bench of our Court reported in *M/s. Wazir Sultan & Sons.* v. *P. S. Rao*[1]. On the immediate question under consideration Rajamannar, C.J., would not agree with the opinion of a single Judge of the Patna High Court who was of the view that if an amount was sent by the debtor by money order but there was nothing in the money order

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1. I.L.R. (1959) Mad. 463 : (1959) 2 M.L.J. 244 : A.I.R. 1959 Mad. 195.

coupon to say on what account the remittance was made, it would not amount to an acknowledgment as it did not appear on its face to be such. The learned Judges after quoting the words of Rowland, J., which stated :

"I think the acknowledgment must appear on its face to be on account of the debt or, at least on account of a debt, whereas in the money order coupon there is nothing at all to show on what account the remittance was made."

observed that they would not agree with the view with respect and said that the above view is not supported either by the language of section 20 of the Limitation Act as it then was, or by the decisions of the Court. They also expressed their note of dissent for the apparent view that it is necessary that the connection between payment and the debt should appear on the face of the writing required by the proviso to section 20 (1) of the old Limitation Act. With utmost respect, I agree with this observation.

It therefore follows that not only there was a payment within the period of limitation as is contemplated under the first part of section 19 of the present Act, but there is also an acknowledgment of the actual debt due and payable by the respondent to the petitioner. Thus the two limbs which I cast earlier which do form part of section 20 of the Limitation Act are satisfied and the ingredients therein are fulfilled. The learned Judge erred in relying upon the decision in *Narasinga Rao Garu* v. *Rangayya*,[1] the facts and the ratio of which has no application to the present case under consideration.

The judgment and decree of the Court below is therefore set aside and the civil revision petition is allowed with costs.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Balasundara Gounder .. *Petitioner**

v.

The Judicial Authority, District Munsif, Tindivanam and another .. *Respondents.*

Madras Panchayats Act (*XXXV of* 1958), *sections* 26 *and* 28—*Judicial authority hearing an election dispute under the Act—If a Court—If can set aside an* ex parte *order.*

Practice—Courts and Tribunals—Established Courts appointed as tribunals under specific statutes—If exercises jurisdiction as Court or as persona designata.

When a question is stated to be referred to an established Court without more, it imports that the ordinary incidents of the procedure of that Court are to attach to those proceedings including a general right of appeal from its decision. The Court will decide the matter in dispute as a Court and not as *persona designata.*

A District Munsif while dealing with a petition under section 28 of the Madras Panchayats Act deals with it as the ordinary Courts of the land and will be entitled to apply the procedural law applicable to that Court, namely, the Code of Civil Procedure. He will be within his jurisdiction to set aside an *ex parte* order or restore an application dismissed for default on the principles laid down in the Code.

National Telephone Co., Ltd. v. *Postmaster-General*, L.R. (1913) A.C. 436, referred.

Adaikappa Chetti v. *Chandrasekhara Thevar*, (1948) L.R. 74 I.A. 264; I.L.R. (1948) Mad. 505 : (1948) 1 M.L.J. 41 : *Tirupathi Nadar* v. *Kandasami Nadar*, (1968) 81 L.W. 642, followed.

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1. (1942) 2 M.L.J. 610.

* W.P. No. 633 of 1967. 28th April, 1969.

Petition under Article 226 of the Constitution praying the High Court to issue a writ of prohibition prohibiting the 1st respondent from proceeding with the enquiry in O.P. No. 10 of 1966.

T. S. Ramaswami, for Petitioner.

R. Krishnamurthi (*Amicus Curiae*), for Respondents.

The Court made the following

ORDER.—This writ petition raises a question of some interest with regard to the scope of the powers of the prescribed judicial authority under section 28 of the Madras Panchayats Act, 1958. Under section 26 of the Act, in so far as it is relevant for purposes of this case, a member shall cease to hold office as such if he acquires any interest in any subsisting contract made with, or work being done for, any Panchayat or any Panchayat Union Council except as a shareholder (other than a director) in a company or except as permitted by rules made under this Act. The second respondent herein filed a petition under section 28 of the Act to the prescribed judicial authority, that is, the District Munsif, Tindivanam, alleging that the petitioner had become disqualified to be a member of the Panchayat Board under the provisions of section 26 above referred to. That petition was adjourned for a number of days and was finally dismissed for default. Subsequently it appears that the second respondent filed an application for restoration of the application which was dismissed for default and that was restored to file. The petitioner alleges that this was done without notice to him. That aspect of the matter I shall deal with later.

But his main point is that the prescribed judicial authority under section 28 of the Act has no power to restore a petition dismissed by it for default. Notification 7 which finds a place at page 264 of S. V. Jayaraman on the Madras Panchayats Act, 1958 reads:—

"The Judicial authority to whom applications under sub-section (1) of section 28 of the Madras Panchayats Act, 1958, may be made shall be in the case of districts other than the Nilgiris, the District Munsif having territorial jurisdiction over the place in which the office of the Panchayat concerned is situated or if there is more than one such District Munsif, the principal District Munsif, and in the case of Nilgiris District, the Subordinate Judge, Ootacamund.

Provided that, in the case of districts other than the Nilgiris, the District Judge shall have power to transfer any such application to any other District Munsif in the district."

The petitioner referred me to Rules found in notification 10 which are found at page 295 onwards of the same book by which the District Munsif having territorial jurisdiction over the place in which the office of the Panchayat Board is situated is constituted as an election Court for purposes of deciding disputes regarding elections and such a District Munsif is deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a District Munsif or a Judge or other officer of the Government. Those rules apply to this case as this is not a case of election dispute. We are concerned only with notification 7 to which I already referred.

The petitioner refers to the decision in *Tiruppulisami* v. *Manickam*[1], where Rajamannar, C.J., in dealing with the question which arose under section 51 of the District Municipalities Act, in which the language used is exactly the same as in section 28 of the Madras Panchayats Act, held that the District Judge in dealing with a question under section 51 would be a Tribunal within the meaning of the term under Article 227 of the Constitution. Incidentally the learned Judge

1. (1954) 2 M.L.J. 680.

observed that the District Judge acting under section 51 of the Act might be a *persona designata*, that is to say, he would differ from the District Court, over which he was presiding, and this observation is relied upon by the petitioner to urge that the prescribed Judicial authority in this case acting as *persona designata*. The question whether the District Judge deciding a question under section 51 was a *persona designata* or was deciding it as a Judge, presiding over the District Court was not finally decided by that learned Judge, because it was not necessary for purposes of that case. The learned Judge was only referring to the argument of the Advocate before him and in relation to such an argument, went on to say that it cannot be said that the District Judge was not a tribunal within the meaning of the term in Article 227 of the Constitution. Even as an observation it is not a final expression of opinion. Therefore, this decision does not help to decide the question at issue before me. The petitioner also drew my attention to the decision in *Koti Reddi* v. *Venkayya*[1], where a Bench of this Court in dealing with the question whether an Election Commissioner hearing an election petition was doing so as a *persona designata*, held that in the absence of an express provision empowering him to set aside his own orders either by way of a review or by way of application under Order 9, Civil Procedure Code, the Election Commissioner had no jurisdiction to set aside an earlier order of his. But in that case unlike as in this case the Election Commissioner was not an officer presiding over a Court. In *National Telephone Co. Ltd.* v. *Postmaster General*[2], Viscount Haldane, L.C. pointed out.

> "When a question is stated to be referred to an established Court without more, it in my opinion, imports that the ordinary incidents of the procedure of that Court are to attach, and also that any general right of appeal from its decisions likewise attaches."

Lord Parker of Waddington in the same case observed:

> "Where by statute matters are referred to the determination of a Court of record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court, its jurisdiction is enlarged, but all the incidents of such jurisdiction including the right of appeal from its decision remain the same."

A similar view was expressed in the decision in *Adaikkappa Chetti* v. *Chandrasekhara Thevar*[3], where the Privy Council has stated the rule:

> "The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto."

It would follow that the District Munsif in this case, who normally decides all cases before him by applying the provisions of the Civil Procedure Code, was also entitled to apply the provisions of that Code in the matter which is referred to him under section 28 of the Madras Panchayats Act. That was the view which Ramaprasada Rao, J., took in the decision in *Tirupathi Nadar* v. *Kandasami Nadar*[4].

I am, therefore, of opinion that as in this case, the District Munsif, while dealing with a petition under section 28 of the Madras Panchayats Act, deals with it as one of the ordinary Courts of the land, the procedural provisions which apply to matters which came up for decision before him, would also apply to a petition under section 28 of the Act. The District Munsif was, therefore, competent to maintain an application for setting aside his own order dismissing the petition for default, if he considered that there were circumstances, justifying such an order.

But the petitioner says that before the District Munsif, it was pointed out that no notice was served on him before the order of dismissal was set aside on the application of the second respondent for default and that the witnesses, who are said to have attested the service of affixture, are fictitious, non-existent persons. If that

1. I.L.R. (1952) Mad. 104 : (1951) 1 M.L.J. 347.
2. L.R. (1913) A.C. 436.
3. (1948) L.R. 74 I.A. 264 : I.L.R. (1948) Mad. 505 : (1948) 1 M.L.J. 41.
4. (1968) 81 L.W. 642.

is so, it is open to the petitioner to apply to the learned District Munsif to set aside the order restoring the application dismissed for default. The learned District Munsif would no doubt pass the necessary orders after taking evidence on the subject. With these observations, the writ petition is dismissed. There will be no order as to costs.

I must thank Mr. R. Krishnamurthi, Advocate who, as *amicus curiae* was of considerable assistance to me in the disposal of this case.

R.M. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Mara Naicker .. *Petitioner**

v.

The Special Tahsildar (Land Acquisition) Harijan Welfare, Pollachi, Coimbatore District and another .. *Respondents.*

Land Acquisition Act (I of 1894), section 4 (1)—Notification—Notice under, actually served on petitioner—Non-publication of the substance of the notification at convenient places in the locality—Effect—No mala fides *alleged against the Government—Allegation against somebody else as responsible for acquisition—Not to affect validity of proceedings.*

So long as a notice under section 4 (1) of the Act has actually been served on the petitioner, it cannot be said that the petitioner was prejudiced or hurt by non-publication of the substance of the notification at convenient places in the locality as contemplated by section 4 (1).

If there are no *mala fides* on the part of the Government the fact that there was some *mala fides* or *malice* on the part of somebody else who instigated the acquisition proceedings does not really establish any *mala fides* so as to vitiate the acquisition proceedings. It is really the Government which ultimately applies its mind and decides upon acquiring the property.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the first respondent relating to the notification G.O.R.No. 6708, Home, dated 17th December, 1966, under section 6 of the Land Acquisition Act published at page 401 in Part II, section 1; of the Fort St. George Gazette, dated 1st March, 1967, relating to S. Nos. 384-1-B, 384-3-B, 391-2-B, 397-2, 425-1-A, 425-2-A of Mannarai village, Palladam taluk, Coimbatore District and to quash the same.

N. R. Chandran, for Petitioner.

T. Satyadev, the Assistant Government Pleader, for Respondents.

The Court made the following

ORDER :—Lands in Survey Numbers 384/1, 384/2 and 384/3, 390/2, 391/1 and 391/2, 397 and 425/1 and 425/2 were acquired by the Government under the provisions of the Land Acquisition Act to enable the Harijans in Nallathupalayam to have a short-cut from their colony to Tirupur, a place where they were working. The Notification under section 4 (1) of the Act was published in the Fort St. George Gazette, dated 27th October, 1965, and the Declaration under section 6 (1) of the Act was published in the Fort St. George Gazette, dated 1st March, 1967. It is to quash these land acquisition proceedings, the petitioner who happens to be one of the joint pattadars of the acquired lands has filed the present writ petition.

Mr. N. R. Chandran, the learned Counsel for the petitioner contended in the first place that there was really no public purpose involved in the acquisition because the two places Nallathupalayam and Tirupur were connected by two other routes

* W.P. No. 3057 of 1967. 2nd September, 1969.

and therefore there was really no necessity to acquire these lands for the purpose of connecting the two places and providing a short-cut. Whether such a pathway is necessary or not is a matter entirely for the Government to consider and decide and it is not open to this Court, under Article 226 of the Constitution of India to sit in judgment over that determination and to come to the conclusion that such a pathway is not necessary. Therefore, the first point urged by the learned Counsel fails.

The second point urged by the learned Counsel is that the provisions of section 4 (1) of the Act have not been complied with, in that the substance of the notification under that section has not been published at convenient places in the locality. For this purpose, the learned Counsel relies on an averment contained in paragraph 6 of the counter affidavit filed on behalf of the respondents, wherein it is stated that the copy of the section 4 (1) notification published in the Fort St. George Gazette, dated 27th October, 1965, was served by affixure on the survey stone of the fields under acquisition on 26th January, 1966, and the substance of the notification was published in the village by beat of tom tom on 26th January, 1966. By relying on this passage the learned Counsel contends that the publication in the village by beat of tom tom is not enough and there must be affixure of the notice at certain convenient places in the locality. Whether this contention is sound or not, does not arise for consideration in this writ petition in view of one peculiar fact. Notice under section 4 (1) of the Act was served on the petitioner himself and in a petition presented by him to the Minister concerned on 4th March, 1966, the petitioner admitted that he had been served with a notice under section 4 (1) of the Act. So long as a notice under section 4 (1) of the Act has actually been served on the petitioner, it cannot be said that the petitioner was prejudiced or hurt by the non-publication of the substance of the notification at convenient places in the locality as contemplated by section 4 (1) of the Act. For this reason I hold that there is no substance in the second contention as well.

The third contention of the learned Counsel for the petitioner is that for the section 5-A enquiry, no notice was given to him. In the counter affidavit it is averred that such a notice was served on the petitioner and as a matter of fact in the petition, dated 4th March, 1966, already referred to, addressed by the petitioner to the Minister concerned, he had admitted the receipt of notice under section 5-A as well. Therefore this contention also fails.

The last of the contentions advanced by the learned Counsel for the petitioner is that the acquisition was *mala fide* because it was the Vice President of the Neruperichal Panchayat Board that was responsible for instigating the acquisition in question. It has been repeatedly held by this Court that so long as there are no *mala fides* on the part of the Government, the fact that there was some *mala fides* or malice on the part of somebody else does not really establish any *mala fides* so as to vitiate the acquisition proceedings. In C.M.P. No. 2778 of 1951, a Bench of this Court had held that a declaration under section 6 of the Land Acquisition Act was not liable to be attacked on the ground that the resolution of a Panchayat on which the acquisition was made was *mala fide* and engineered by political opponents, if the owner had an opportunity of putting forward his objection before the Government. The reason for this conclusion is that it is really the Government which ultimately applies its mind and decides upon acquiring the property and so long as there is no allegation of *mala fides* made against the Government, the fact that somebody else had been responsible for initiating the proceedings or inducing the Government to take the acquisition proceedings will not really affect the validity of the acquisition proceedings. This conclusion of the Bench was followed by Venkatarama Ayyar, J., *Gopalakrishna* v. *Secretary, Board of Revenue*[1]. No other point was urged before me. In these circumstances, all the points raised by the learned Counsel for the petitioner fail and the writ petition is dismissed. There will be no order as to costs.

V.S. *Petition dismissed.*

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1. (1953) 2 M.L.J. 744.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Murugesa Muthu Pillai .. *Appellant**

v.

Arumugathammal and another .. *Respondents.*

Endowment—Deed of—Interpretation—Dedication of property for the performance of charities—Substantial income not to form an accretion to the corpus but to be utilised by the manager—Deed, if creates a trust or charge only in favour of the charity—All the clauses of the deed to be read together and no clause to be read in isolation.

If reading the document as a whole it is clear that whatever remains, whether substantial or otherwise, after the charities are performed, it is not to form an accretion to the corpus but can be utilised and taken by the manager or the trustee as his own without any liability to render an account and with no obligation to hold it on behalf of the trust the endowment will not be an outright dedication but a charge only is created in favour of the charity for the expenses or dhittam specified in the deed of endowment. When these tests are applied, to the instant case there can be only one answer that the intention of the testator was only to provide for the continuance without break of the performance of the charities in the manner in which he himself was doing. During his lifetime he had not dedicated the property itself. But as clause 6 of the will shows he was utilising a small fraction of the income for the performance of the charities. The charities have been specified in schedule E. The limit of expenses also had been mentioned. Above all, there is a distinct provision in clause 11, the residuary clause (relating to the ultimate destination of the surplus) which provides that the daughter alone shall take the property and none other. Reading all the clauses together it is clear what the testator has done under his will is only to create a charge over the properties. The result is that the plaintiff is not entitled to question alienation. The alienees however can take the property only subject to the burden of providing 1¼ kottahs of paddy and Rs. 10 per year which would be a charge upon the property in the hands of the alienee.

Appeal against the Decree of the Court of the Additional Subordinate Judge, Tirunelveli, in Appeal Suit No. 263 of 1963, prefered against the decree of the Court of the District Munsif of Ambasamudram in Original Suit No. 39 of 1960.

R. Shanmugham, for Appellant.

V. Ratnam, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in the second appeal. One Eswaramurthi Pillai had a daughter Shanmughavadivu through his second wife. She is the 7th defendant in the action. One of her sons is the plaintiff, her other sons being defendants 8 to 11. Defendants 1 to 6 and defendants 12 and 13 are alienees claiming title under Shanmughavadivu aforesaid. This Eswaramurthi left a will, Exhibit A-1, of the year 1925 bequeathing all his properties to his daughter and also providing for the performance of certain charities. He also left a settlement deed, Exhibit A-2 of the year 1905 settling the properties upon his daughter, and also providing for the performance of certain other charities. In the second appeal we are concerned with two items of properties; one item is 68 cents which is item 21 of the B schedule to the will Exhibit A-1 and item 2, 62 cents, the property covered by the settlement Exhibit A-2. The plaintiff filed the action to recover possession of the suit property on the ground that there has been a complete outright dedication of these items towards the charities and that the 7th defendant, the daughter of Eswaramurthi had no right to alienate the properties in question.

* S.A. No. 1461 of 1964. 8th September, 1969.

The case of the contesting defendants was that there was only a charge created over these properties and there was not an outright and complete dedication as claimed by the plaintiff. The trial Court upheld the contentions of the plaintiff and decreed the suit as prayed for, but on appeal, the lower appellate Court has come to a contrary conclusion.

Before I proceed further, it is necessary to set out the substance of the arrangement provided in the will Exhibit A-1. The preamble portion of the will clearly manifests the predominent intention or object of the father (the testator) that all his properties, movables and immovables, should belong only to his daughter and nobody else shall have any right thereto. In clause 6 of the will, the testator has mentioned that out of the income from item I of A schedule and item 21 of the B schedule, the testator has been performing certain charities more fully set forth in schedule E appended to the will and that after his life-time his only daughter Shanmughavadivu and her issues shall perform the charity properly and regularly and without default. What is crucial for our present purpose is the recital in clause 6 that the testator was performing the charities out of the income from the properties and that the daughter too was to perform the charities out of the income in the manner in which it was being done by the father. Clause 11 contains a residuary provision that the properties not specifically mentioned in the will and properties which may come into existence later shall be taken by the testator's daughter after his life time and nobody alse shall have any right or interest over these properties. The Lower Appellate Court has found on the evidence that the properties are valuable double crop nanja lands and that after meeting the specific items of expenditure in connection with the charity for which a scale has been laid down in the will, there will be substantial surplus in the hands of the daughter. The charities which are mentioned and the expenses to be incurred in connection therewith cannot be expanded. They merely consist of some pooja or worship to be performed in three temples, the total expenses thereof being limited to 1¼ kottahs of paddy and Rs. 10 per year. The finding of fact by the lower appellate Court that after meeting these items of expenditure there will be ample surplus in the hands of the daughter is supported by adequate evidence and does not call for interference in the second appeal and the only question is whether on a reading of the will as a whole could it be said that there has been a complete outright dedication of the properties or only a charge has been created for the expenses mentioned above.

It is unnecessary to refer to the wealth of case law on this point bearing upon the determination of the character of the endowment and it is sufficient to refer to the following statement of law at pages 1128 and 1129 in the recent decision of the Supreme Court reported in *Menakuru Dasaratharami Reddi* v. *Duddukuru Subba Rao*[1].

"Now it is clear that dedication of a property to religious or charitable purposes may be either complete or partial. If the dedication is complete, a trust in favour of public religious charity is created. If the dedication is partial, a trust in favour of the charity is not created but a charge in favour of the charity is attached to, and follows, the property which retains its original private and secular character. Whether or not dedication is complete would naturally be a question of fect to be determined in each case in the light of the material terms used in the document. In such cases it is always a matter of ascertaining the true intention of the parties; it is obvious that such intention must be gathered on a fair and resonable construction of the document considered as a whole. The use of the word 'trust' or 'trustee' is no doubt of some help in determining such intention but the mere use of the words cannot be treated as decisive of the matter. Is the private title over the property intended to be completely extinguished? Is the title in regard to the property intended to be completely trans-

1. (1957) S.C.J. 835 : (1957) 2 An.W.R. (S.C.) 175 : (1957) 2 M.L.J. (S.C.) 175 : (1957) S.C.R. 1128 : A.I.R. 1957 S.C. 797.

ferred to the charity? The answer to these questions can be found not by concentrating on the significance of the use of the word 'trustee' or 'trust' alone but by gathering the true intent of the document considered as a whole. In some cases where documents purport to dedicate property in favour of public charity, provision is made for the maintenance of the worshipper who may well be a member of the family of the original owner of the property himself and in such cases the question often arises whether the provision for the maintenance of the manager or the worshipper from the income of the property indicates an intention that the property should retain its original character and should merely be burdened with an obligation in favour of the charity. If the income of the property is substantially intended to be used for the purpose of the charity and only an insignificant and minor portion of it is allowed to be used for the maintenance of the worshipper or the manager, it may be possible to take the view that dedication is complete. If, on the other hand, for the maintenance of public charity a minor portion of the income is expected or required to be used and a substantial surplus is left in the hands of the manager or worshipper for his own private purposes, it would be difficult to accept the theory of complete dedication."

It will thus be seen that ultimately the solution to the problem depends upon the proper interpretation of the deed of endowment if there should be any. All the clauses of the deed of endowment will have to be read together and no clause should be read in isolation and detached from the rest of the document. The relevant considerations are (1) whether the charity is an expanding charity and whether the manager or the trustee who is to conduct the charity is enjoined to spend the entire income upon the charity. (2) Whether the charity would exhaust the entire income or whether there will be a substantial surplus or margin left after meeting all the expenses and (3) the provision as to the ultimate destination of the surplus. Bearing on the question of the ultimate disposition of the surplus reference may be made to the Bench decision of this Court in *Kathan Muthirian* v. *Siva Baghiathammal*[1], in which the following observations are made at page 109:—

"This is a clear expression that, even though there may be a gift to the idol, if the surplus income is given absolutely to the sons, the property would vest in the latter subject to the trust in favour of the idol. The case in *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[2], is the strongest on the point. There was a gift by a lady of certain lands for the support of the daily worship of an idol, and the deed contained a clause that in the event of there being a surplus after these uses had been satisfied out of the revenue of the said lands, it should be applied to the support of the family. There was also a direction in the will that the heirs should have no power of gift or sale over the property bequeathed. Notwithstanding this language, the Judicial Committee came to the conclusion that the property was only burdened with a trust, and that otherwise it vested absolutely in the legatees. In *Mofassed Karim* v. *Mahammad*[3], which was a case of Muhammadan Wakf, Stephen and Mookerjee, JJ., held that the dedication of a portion of the income for the purposes of a mosque created at best only a charge upon the land and that the property was heritable and transferable. To the same effect is the decision in *Shookmoy Chunder Dass* v. *Monohari Dassi*[4]. In *Kulada Prosad* v. *Kali Das Naik*[5] and *Mahin Chandra Sarkar* v. *Hara Kumari Dasei*[6], two different Benches of the Calcutta High Court recently construed documents granting the surplus income as conveying an absolute estate subject to a trust. The leaning of these cases is apparently towards vesting property in living persons and to enforce on them obligations to carry on the testator's wishes. It is inconsonance with the principles of Hindu Law and with the wishes of pious donors that their heirs should be the owners of the property and that they should maintain the family prestige by conducting the charities. *Prima facie*, a Hindu who desires

1. (1916) 4 L.W. 105.
2. (1880) I.L.R. 5 Cal. 438.
3. (1905) 2 Cal.L.J. 166.
4. (1881) I.L.R. 7 Cal. 269.
5. (1915) I.L.R. 42 Cal. 536.
6. (1915) I.L.R. 42 Cal. 561.

to devote a portion of his property for religious purposes and who has near relations to whom he bequeathes the bulk of his property may be presumed to have granted only a charge on the estate to the charity. His primary intention will be that his descendants should have possession of the *corpus* and should maintain the traditions by conducting the charity."

If reading the document as a whole it is clear that whatever remains, whether substantial or otherwise, after the charities are performed, it is not to form an accretion to the corpus but can be utilised and taken by the manager or the trustee as his own without any liability to render an account and with no obligation to hold it on behalf of the trust the endowment will not be an outright dedication but a charge only is created in favour of the charity for the expenses or *dhittam* specified in the deed of endowment. When these tests are applied, to the instant case there can be only one answer that the intention of the testator was only to provide for the continuance without break of the performance of the charities in the manner in which he himself was doing. During his lifetime he had not dedicated the property itself. But as clause 6 shows he was only utilising a small fraction of the income for the performance of the charities. The charities have been specified in schedule E. The limit of expenses also had been mentioned. Above all, there is a distinct provision in clause 11, the residuary clause, (the clause relating to the ultimate destination of the surplus) which provides that the daughter alone shall take the property and none other. Reading all the clauses together it is clear that what the testator has done under his will is only to create a charge over the properties. The result is that the plaintiff is not entitled to question the alienation. The alienees however can take the property only subject to the burden of providing 1¼ kottahs of paddy and Rs. 10 per year which would be a charge upon the property in the hands of the alienee.

The next item is the charge provided under Exhibit A-2 the settlement deed. The position here is *a fortiori*. The settlement deed itself expressly recites that the settlor was performing the charity out of the income and that the settlee also should conduct and perform the charity in the same manner like the settlor out of the income from the properties. The properties themselves have not been dedicated to the charity either by the settlor during his lifetime or under the settlement deed, Exhibit A-2. Here too the scale of expenses or *Dhittam* has been fixed and it is 2¼ kottahs per annum irrespective of what the settlee may get as income. A perusal of the settlement deed also shows that the paramount or predominent intention of the settlor was that his daughter the 7th defendant should take the property subject to this charge. For all these reasons, I have no hesitation in holding that in respect of both the items a charge only had been created with the result that the plaintiff's suit fails subject to a charge as mentioned above. The result is the second appeal fails and is dismissed. No costs.

No leave.

V.M.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M.M. ISMAIL.

A. Muthuswami Pillai .. *Petitioner**

v.

The Commissioner, Hindu Religious and Charitable Endowments, Nungambakkam, Madras-34, and others .. *Respondents*.

Madras Hindu Religious and Charitable Endowments Act (*XXII of* 1959), *section* 45 (4) —*Scope*.

The power to suspend, remove or dismiss an executive officer conferred and contemplated by section 45 (4) is one to do so by way of punitive action or

* W.P. No. 3494 of 1967. 14th October, 1969.

disciplinary action against the Executive Officer. The power to revoke or cancel an earlier order appointing an Executive Officer, which will result in the removal of the Executive Officer is not one contemplated by that section.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records in K. Dis. No. 29939 of 1967 on the file of the 1st Respondent herein and to quash the order passed therein dated 11th September, 1967.

M.R. Narayanaswamy, for Petitioner.

T. Satyadev, Assistant Government Pleader for Respondent No. 1.

The Court made the following

ORDER.—The administration of Sri Nachiarammal Endowments, Vandiyur, Madurai Taluk, Madurai District, is governed by a scheme settled in O.P.No. 111 of 1953 before the Deputy Commissioner of Religious Endowments at Tanjore, as confirmed by the Commissioner, Hindu Religious and Charitable Endowments, Madras, in A.P.No. 9 of 1956, in O.S.Nos. 60 and 90 of 1956 on the file of the Sub-Court, Madurai, and in A.S. Nos. 156 and 182 of 1958 on the file of this Court. However, certain differences of opinion and disputes seem to have arisen between the petitioner herein and the third respondent herein, with respect to the administration of the Endowment, and, because of these differences, the petitioner applied to the Deputy Commissioner, Hindu Religious and Charitable Endowments, Madurai, for appointment of an Executive Officer and action on that application seems to have been taken by the Commissioner, Hindu Religious and Charitable Endowments, Madras, who by his order in R.C.No. 779/67-E.3, dated 1st February, 1967 made such an appointment. Meanwhile, all the persons interested in the Endowment, with a view to put an end to the quarrel, filed O.A.No. 3 of 1967 before the Deputy Commissioner, Hindu Religious and Charitable Endowments, Madurai, for the modification of the original scheme, and such a modification was ordered on 4th April, 1967. Thus it will be seen, that the Commissioner passed an order appointing an Executive Officer before the modification of the Scheme was effected by the Deputy Commissioner on 4th April, 1967. Subsequent to the order of the Deputy Commissioner modifying the scheme the petitioner herein filed an application before the Commissioner, purporting to be under section 45 (4) of the Madras Hindu Religious and Charitable Endowments Act, 1959, for removing the Executive Officer so appointed on the ground that the presence of an executive Officer is no longer necessary, in view of the quarrels between the parties having been settled and the scheme itself having been amended. The Commissioner, by order dated 11th September, 1967 took the view that such an order, as asked for by the petitioner, could not be passed under section 45 (4) of the Act. It is to quash this order of the Commissioner the present writ petition has been filed.

In my opinion, the order of the Commissioner, in so far as it relied on section 45 (4) of the Act, is correct and does not call for any interference. Section 45 (4) states :

> "The Commissioner may, for good and sufficient cause, suspend, remove or dismiss the executive officer."

The power to suspend, remove or dismiss an Executive Officer conferred and contemplated by this section is one to do so by way of punitive action or disciplinary action against the Executive Officer. The power to revoke or cancel an earlier order appointing an Executive Officer, which will result in the removal of the Executive Officer is not one contemplated by section 45 (4) of the Act. Consequently the order of the Commissioner, in so far as he has held that section 45 (4) of the Act does not contemplate such an order, is correct and does not call for interference. Therefore, the writ-petition fails and is dismissed. I am making it clear that the dismissal of this writ petition is solely based upon the interpretation of section 45 (4) and it will not prejudice the right of the petitioner, or any other person

interested in the Endowment, to approach the Commissioner either under section 23 of the Act or any other provision of law, under which they could ask for a revocation or cancellation of his order dated 1st February, 1967 appointing an Executive Officer on the ground that the need for appointing such an Executive Officer no longer subsists. There will be no order as to costs.

V.K. *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. K. VEERASWAMI, *Chief Justice* MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE G. RAMANUJAM.

M/s. N.P. Motor Service (P.) Ltd., Namakkal .. *Petitioner**

v.

M/s. Andavar Transports (P.) Ltd. and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Motor Vehicles Act* (*IV of* 1939), *sections* 47 (3), 57 *and* 62—*Writ Petition against grant of permit—High Court's power to make interlocutory orders during pendency of—Extent—Cannot be exercised so as to contravene section* 47 (3)—*Scope of section* 62.

Once there has been a decision under section 47 (3) of the number of permits for a given route, the Regional Transport Authority in dealing with the applications for the grant of such permits cannot exceed that number, nor can the State Transport Appellate Tribunal in appeal from the Regional Transport Authority's order exceed that number. Even in interlocutory proceedings pending a writ petition, it would be improper for the High Court to pass an order which will have the effect of exceeding that number. While it is true that the High Court has inherent powers under Article 226 of the Constitution to pass appropriate orders to meet the exigencies of the situation and the needs of a given case, it cannot be exercised so as to contravene the provision of a statute as is found in section 47 (3) in the context of the other provisions of the Motor Vehicles Act. Relief should be so moulded as to reduce the loss, inconvenience, etc., but without transgressing the statute.

Nagabhushanam v. *Ankiah*, (1968) 2 An.W.R. 154: A.I.R. 1968 A.P. 274, followed:

It is now well established that a prior determination of the number of permits under section 47 (3) is the very basis of the jurisdiction subsequently to grant permits to qualified applicant. It would follow that when the result of an interim order will be to enlarge the number of permits for the route beyond the number which has been granted by the Regional Transport Authority (or the State Transport Appellate Tribunal in appeal such an enlargement also will be without jurisdiction, in the absence of a prior determination under section 47 (3), permiting such enlargement.

Section 62 of the Motor Vehicles Act cannot be relied upon by the High Court for passing interlocutory orders during the pendency of writ proceedings.

Petitions praying that in the circumstances stated therein and in the affidavit filed in C.M.P.No. 13000 of 1969, the High Court will be pleased to suspend the operation of the order of the Honourable Mr. Justice Ismail, dated 14th August, 1969 and made in W.P.Nos. 1815 and 2582 of 1967 pending W.A.Nos. 412 and 413 of 1969 by maintaining the *status quo*—W.A.Nos. 412 and 413 of 1969 preferred to the High Court under clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ismail, 14th August, 1969 and made in the exercise of Special Original Jurisdiction of the High Court in W.P. Nos. 1815 and 2582 of 1969 presented under Article 226 of the Constitution of India to issue. Writs of *certiorari* calling for the records connected with the order of the State Transport Appellate Tribunal, Madras, made

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* Civil Miscellaneous P. Nos. 13000 and 13001 of 1969 in W.A. Nos. 412 and 413 of 1969. 1st October, 1969.

in Appeal No. 187 of 1967 dated 30th May, 1967, and in Appeal Nos. 163 of 1967 and 187 of 1967 respectively and quash the same.

K.K. Venugopal for *M. Kalyanasundaram*, for Petitioner.

M.N. Rangachari, The Government Pleader, *K. Chidambaram* for *G. Ramaswami* and *V. Krishna Menon*, for Respondents.

The Judgment of the Court was delivered by

Ramakrishnan, J.—The order of reference to which two of us were parties sets out the question for decision. At the time of the hearing of the reference, the parties who appeared as petitioners in the civil miscellaneous petitions were heard through their counsel. The learned Government Pleader also was heard.

Under section 42 of the Motor Vehicles Act, no motor vehicle can ply except in accordance with the terms and conditions of a permit granted by the Transport Authority. Section 47 of the Act prescribes the matters which should be taken into consideration while considering an application for such a permit. Section 47 (3) authorises the Regional Transport Authority to fix the number of buses on a particular route. Section 48 prescribes the power of the Regional Transport Authority to grant permits. Section 57 provides for the procedure before granting the application for a permit, including a public hearing at which representations shall be heard. Formerly, there was some uncertainty in the decisions as to the scope of section 47 (3) in the scheme of the Act. It would appear that even without formal orders passed under section 47 (3) fixing the number of stage carriages on a route, applications for grant of permits were considered by the Regional Transport Authority under section 57 and while dealing with those applications, the Regional Transport Authority was exercising the power both to fix the number of stage carriages as well as the person or persons to whom permit should be granted. But recent decisions of the Supreme Court, starting from the decision in *Abdul Mateen* v. *Ram Kailash*[1], have clarified the position beyond any manner of doubt. The gist of these decisions is that applications for the grant of stage carriage permits must be dealt with by the Regional Transport Authority in two stages. The first stage involves the determination under section 47 (3) of the Act of the number of stage carriages which could be permitted to operate on the route. After such determination has been made, a decision has to be taken at the second stage as to which of the applicants is best qualified for the grant of the permit. The considerations that weigh for deciding upon the number of stage carriages which could be allowed on a route while dealing with the question under section 47 (3) are quite different from the considerations which will be taken into account when deciding the person best qualified for the grant of the permit under section 57 of the Act. In *Abdul Mateen* v. *Ram Kailash*[1], it is observed:

> "Where a limit has been fixed under section 47 (3) by the Regional Transport Authority and thereafter the said Authority proceeds to consider application for permits under section 48 read with section 57, the Regional Transport Authority must confine the number of permits issued by it within those limits."

The position is made further clear in *Jayaram Motor Service* v. *Sri S. Rajarathinam and others*[2], by the Supreme Court:

> "On an examination of the relevant provisions of the Act and the purpose behind sections 47 and 57, we are convinced that before granting a stage carriage permit two independent steps have to be taken.
>
> Firstly, there should be determination by the Regional Transport Authority under section 47 (3) of the number of stage carriages for which stage carriage permits may be granted in that route. Thereafter applications for stage carriage permits in that route should be entertained. The Regional Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under section 47 (3)."

1. (1963) 3 S.C.R. 523: A.I.R. 1963 S.C. 64. 2. (1967) 2 S.C.W.R. 857.

In *R. Obliswami Naidu* v. *The Additional State Transport Appellate Tribunal, Madras*[1], the Supreme Court held that first there should be an order under section 47 (3) and only thereafter applications for grant of stage carriage permits could be entertained. The right course in such cases would be to dismiss the applications *in limine* on the ground that there had been no prior order under section 47 (3); and not keep the applications pending in order to await an order under section 47 (3). Taking the principle of these decisions into consideration, a Bench of this Court consisting of Veeraswami, C. J., and Gokulakrishnan, J., held in—*Gajendra Transports (P.) Ltd., Tiruppur* v. *Annamalai Bus Transports Ltd., Pollachi, and another*[2], that an order under section 47 (3) is a condition precedent to the exercise of the power under section 48 (1) read with section 57. The same Bench observed also that the absence of such an order under section 47 (3) goes to the root of the jurisdiction of the Regional Transport Authority to exercise its power to grant a permit to an applicant under section 48 (1) read with section 57.

From the principles laid down above it follows as a broad proposition that once there has been a decision under section 47 (3) of the number of permits for a given route, the Regional Transport Authority in dealing with the applications for the grant of such permits cannot exceed that number, nor can the State Transport Appellate Tribunal in appeal from the Regional Transport Authority's order exceed that number. The further question is whether when the decision of the State Transport Appellate Tribunal is challenged in a writ petition before the High Court under Article 226 of the Constitution, the High Court by way of an interlocutory order can give a direction which will imply that both the grantee of the Regional Transport Authority and the grantee of the State Transport Appellate Tribunal can operate on their permits pending disposal of the writ petition. *Prima facie* such a direction cannot be given at the conclusion of the writ proceedings, because it will imply the grant of more permits than what have been settled under section 47 (3) proceedings. It is clear to us that even at the interlocutory stage it would be illegal to give such a direction, because it will go contrary to the determination under section 47 (3) as to the exact number of bus permits that can be granted for the given route, in the background of the relevant circumstances, including the requirements of the public, the condition of the road and so on for the route in question.

The learned Counsel Sri K. K. Venugopal, appearing for some of the petitioners, relied upon the observations of a Bench of this Court consisting of Rajagopalan and Balakrishna Ayyar, JJ., in—*Ramaswmai Goundar* v. *Obliswami Naidu and another*[3]. The attention of the Bench was drawn to the question that by reason of such an interlocutory order, section 47 (3) would be contravened. This argument was repelled by the Bench by observing that notwithstanding the provisions of section 47 (3), the Regional Transport Authority has power to add to the number of stage carriage permits in a particular route and an appellate authority can pass whatever order the authority of the first instance could have passed. By extension of this principle the Bench appears to have been of the view that there would be nothing illegal from the point of view of section 47 (3) if an interlocutory order is passed by this Court in a Writ Petition under article 226 of the Constitution permitting both the grantees to operate on the route. But this view of the Bench cannot be sustained any longer after the subsequent decisions of the Supreme Court as well as the Bench of this Court referred to above. They clearly lay down that the jurisdiction of the Regional Transport Authority as well as the State Transport Appellate Tribunal is limited to grant only permits upto the number decided upon in proceedings under section 47 (3). It would therefore follow that even in interlocutory proceedings before this Court, it would be improper to pass an order which will have the effect of exceeding that number.

The learned Counsel, Sri K.K. Venugopal, referred to the inherent powers of the High Court under Article 226 of the Constitution to pass appropriate orders to

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1. (1969) 2 S.C.J. 654 : (1969) 1 S.C.W.R. 569 : A.I.R. 1969 S.C. 1130.
2. W.A. No. 274 of 1968 (Mad. H.C.).
3. C.M.P. No. 1387 of 1958 in W.P. No. 173 of 1958 (Mad. H.C.).

meet the exigencies of the situation and the needs of a given case. While we are prepared to concede that such a power exists in the High Court, it appears to us that it cannot be exercised so as to contravene the provision of a statute such as is found, in section 47 (3), in the context of the other provisions of the Motor Vehicles Act dealt with above.

Our attention has been drawn at the time of the hearing of these petitions, to a decision of the Andhra Pradesh High Court in *Nagabhushanam* v. *Ankiah*[1]. The facts in that case were that under section 47 (3) of the Motor Vehicles Act, the running of two buses on a given route, had been permitted. The Regional Transport Authority granted the permits to two persons. The State Transport Appellate Tribunal in appeal set aside the permit granted to one of the persons and maintained the grant to the other. The question arose whether in a writ petition filed by the grantee of the Regional Transport Authority whose grant was set aside by the State Transport Appellate Tribunal, an interlocutory order could be passed so as to permit the two grantees of the Regional Transport Authority, to operate on the route along with the grantee of the State Transport Appellate Tribunal. Relying upon the decision of the Supreme Court in *Abdul Mateen* v. *Ram Kailash*[2], the Andhra Pradesh High Court hold that an interim relief of the above kind cannot be granted. When the attention of the learned Judges was drawn to the wider powers under Article 226 of the Constitution, they observed that while the High Court could pass suitable orders granting interim relief, ordinarily it would not pass an order which would amount to issuing permits contrary to the law. We are of opinion that the above decision lays down a correct view of the law. What we are required to consider is not the propriety of an interlocutory order standing by itself, but an interlocutory order on which depends the grant of additional permits *albeit* for the time being—which are beyond the limit prescribed under section 47 (3), and therefore will be violative of the law. A dependent grant in such circumstances cannot be validly made.

Learned Counsel Mr. K.K. Venugopal while recognising the validity of the propositions mentioned above, in cases where there has been a prior determination of the number of permits for the route under section 47 (3), would urge that in the present cases, there has been no such prior determination, and therefore it will be still open to us to pass interlocutory orders, permitting both the grantee of the Regional Transport Authority and the grantee of the State Transport Appellate Tribunal to operate their buses. He urged that when there has been no decision under section 47 (3), the power of this Court cannot be fettered. We are unable to agree with this representation also. In the Bench decision referred to above in W.A. No. 274 of 1968, it has been held that a prior determination of the number of permits under section 47 (3), is the very basis of the jurisdiction to grant subsequently permits to qualified applicants. It would therefore follow that when there has been no prior determination of the number of permits under section 47 (3), the very grant of a permit under section 48 read with section 57 to an applicant would be illegal, because an essential preliminary part of the statutory procedure, had not been followed. A *fortiori* it would follow that when the result of an interim order will be to enlarge the number of permits for the route beyond the number which has been granted by the Regional Transport Authority (or the State Transport Appellate Tribunal in appeal) such an enlargement also will be without jurisdiction, in the absence of a prior determination under section 47 (3), permitting such enlargement.

Next, the learned Counsel urged that when there has been a determination under section 47 (3) that a particular number of permits could be granted for a given route, but the Regional Transport Authority has granted permits only upto a lesser number, it will be open to this Court in interlocutory proceedings to pass an order which will have the effect of enlarging the permits upto the maximum permitted under section 47 (3). But this is a purely hypothetical situation which has not arisen in these cases. It is also very unlikely to rise, because in our experience

1. (1968) 2 An.W.R. 154 : A.I.R. 1968 A. P. 274.
2. (1963) 3 S.C.R. 523 : A.I.R. 1963 S.C. 64.

when once there has been a decision under section 47 (3) about the number of permits, it rarely happens that all the permits are not granted.

There was a reference by the learned Counsel to section 62 of the Motor Vehicles Act which deals with the grant of permits for a temporary period, and the power vested in the Regional Transport Authority to grant them in certain special circumstances. Obviously that power cannot be relied on, by this Court for passing an interlocutory order during the pendency of Writ Proceedings.

Finally, there is the question of ultimate hardship to the parties, which is referred to by the parties concerned for granting such interlocutory relief. The Bench of this Court in *Ramaswami Goundar* v. *Obliswami Naidu*[1] has referred to the necessity to reduce to a minimum the inconvenience, hardship and the loss, actual or prospective, to which the parties would be put, ir suitable interlocutory orders are not passed. While it is necessary to bear these requirements in mind, they cannot be justification for passing an order which will be contrary to the statute. Relief should be so moulded as to reduce the loss, inconvenience, etc., but without transgressing the statute. This is the view which the Andhra Pradesh High Court held in the decision cited above. Further, in our experience, what happens in these cases it that during the pendency of the appeal before the State Transport Appellate Tribunal, the Regional Transport Authority grantee is allowed to operate on his permit to meet the requirements of the public. If the State Transport Appellate Tribunal reverses in appeal the grant of the Regional Transport Authority, considering the large stakes involved, the Regional Transport Authority grantee wastes no time and applies for relief under Article 226 of the Constitution before the High Court with the minimum delay. In such circumstances, the State Transport Appellate Tribunal grantee could not be expected to have run his buses on the permits granted by the State Transport Appellate Tribunal for any appreciable length of time when interlocutory orders are applied for in writ proceedings. There will always be occasion in such cases to determine which of the grants should be preserved pending the disposal of the writ petition, so as to cause the minimum hardship and inconvenience and without violating the statute which will be the case if there is a direction to grant two permitswhere there is jurisdiction to grant only one permit. But we do not want to give any further precise directions so far as this aspect of the matter is concerned, as they must depend upon the circumstances of each case.

The reference is accordingly answered as above.

V.K. — *Reference answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Nagammal and others ... *Appellants**

v.

Nanjammal and another ... *Respo dents.*

Hindu Succession Act (XXX of 1956), section 22—Interpretation—Preferential right of the non-alienating co-heirs to take the transfer, a primary right—Legislature not clearly spelling out the remedial right—Transfer by the co-heir without reference to the other co-heirs, if voidable at their instance—Transfer of Property Act (IV of 1882), section 40.

While clause (1) of section 22 of the Hindu Succession Act gives the preferential right for the acquisition of interest proposed to be transferred by a co-heir, clause (2) provides for the ascertainment of the amount of consideration or value payable by the co-heirs who intend to exercise the preferential right, if the co-heirs are

1. C.M.P. No. 1387 of 1958 in W.P. No. 173 of 1958.

*S.A. No. 1171 of 1965. 10th October, 1969.

unable to agree about the price. If any co-heir who intended to exercise the preferential right, is found not willing to acquire the interest for the consideration determined by Court on application, he cannot be compelled to go through the purchase, but can be made liable to all costs of the application. Clause 3 of section 22 provides that, if there is competition between two or more co-heirs specified in Class I for acquiring the interest proposed to be transferred, that heir who offers the highest price shall be preferred. Having said so much, Parliament could have laid down how and when the right of preference is to be exercised.

When interpreting the section, one can properly assume that Parliament had in mind the practice of pre-emption present in the country and the several pre-emption laws. A Legislature may be deemed to be conversent with the laws, current within its territory. But that will not permit the adoption of the incidents of pre-emption recognised or provided for in other pre-emption laws, and in the Muslim law of pre-emption.

Parliament must have had in mind the two fold aspect of the right in the pre-emption laws current in the country: (1) the primary or substantive right to have an offer made and (2) the secondary or remedial right of the co-heirs if the property is sold without being first offered to them to take it from the purchaser. Thus, Parliament has emphasised upon the primary right of pre-emption and left the remedial right to the common law for the Courts to mould it according to the circumstances.

It is a fundamental principle of our jurisprudence that, where there is a legal right, there is a corresponding duty enforceable by an action in a Court of law. *Ubi jus ibi remedium, i.e.*, where there is a right, there is a remedy.

The primary or principal right, the right to offer of the thing about to be sold while it is not an interest or right in the property itself, as an inherent right at attaches itself to the property. The other rights can follow therefrom as remedial and in enforcement of this primary right, since the preferential right conferred by law has to be respected and enforced by Courts in accordance with the legislative intent.

A co-heir who shares land along with another co-heir gets an advantage or benefit to acquire the latter's interest in common property manifestly for the beneficial enjoyment of his own interest therein, when the latter co-heir seeks to dispose of his interest. A co-heir is thus saddled with burden and his right of enjoyment as absolute owner free to dispose of his interest to whomsoever he pleases is restrained. Under the first part of section 40, the dominent right of the non-alienating co-heir may be enforced against a transferee for consideration with notice thereof, as the statutory obligation of a co-heir gets annexed to the ownership of the land by reason of his inheritance of the land as co-heir. In the light of the foregoing discussion it follows that the right of a person to transfer his interest in property inherited along with other Class I heirs is subject to the preferential right of his co-heirs to take the transfer, and that any transfer in derogation of that right would be voidable at the instance of the co-heirs who are denied their preferential right.

Appeal against the Decree of the Court of the Additional Subordinate Judge, Erode in Appeal Suit No. 99 of 1963, preferred against the decree of the Court of the District Munsif of Erode in Original Suit No. 633 of 1960.

K. Sarvabhauman and *T. R. Mani*, for Appellants.

T. Srinivasan, for Respondents.

The Court delivered the following

JUDGMENT.—This second Appeal raises an interesting problem in the application of section 22 of the Hindu Succession Act, The problem has been rendered difficult

by the absence of clear legislative guidance. Mulla in his principles of Hindu Law, 12th Edition, remarks on the section:

"The section requires more explicit and stringent language."

To state the facts of the case in brief: The suit properties, lands with wells, belonged to one Bomma Naicken who, on his death in August 1958, left surviving his widow and four daughters. Under the Hindu Succession Act, as Class I heirs the four daughters and the widow share the properties equally, each taking a 1/5th share. Plaintiffs 1 to 3 in the suit are the three daughters and the 1st defendant is the other daughter. Without reference to her co-heirs, the 1st defendant, under the original of the sale deed Exhibit A-5, dated 11th December, 1959, sold her share in the suit properties to one Pappa Naicken, the 2nd defendant in the suit, for a consideration of Rs. 1,000. The suit has been instituted on 12th July, 1960 in assertion by the plaintiffs of their preferential right to purchase her 1/5th share under section 22 of the Hindu Succession Act. During his lifetime, Bomma Naicken had created a mortgage over his properties for Rs. 2,000 in favour of the 1st plaintiff as evidenced by Exhibit A-1 dated 21st May, 1952. The widow, the other co-heir, had, with reference to her share, executed two sale deeds, Exhibit A-2 in favour of the 1st plaintiff and Exhibit A-3 in favour of the 2nd plaintiff, directing them to discharge the mortgage due by the estate; and the dispute is confined to the alienation, Exhibit A-5 in favour of the stranger. The Courts below have rejected the plaintiff's claim and dismissed the suit. The Lower Appellate Court *inter alia* remarks that section 22 does not provide as to what is to happen if one of the co-heirs sells his or her interest without informing the other co-heirs who have preferential right, the section not providing for any notice being given.

Section 22 of the Hindu Succession Act, 1956 under the Marginal heading "preferential right to acquire property in certain cases" runs thus:

"Where, after the commencement of this Act, an interest in any immovable property of an intestate, or in any business carried on by him or her, whether solely or in conjunction with others, devloves upon two or more heirs specified in Class I of the Schedule, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under this section shall, in the absence of any agreement between the parties, be determined by the Court on application being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of or incident to the application.

(3) If there are two or more heirs specified in Class I of the Schedule proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred."

(Explanation omitted.)

The preferential right to acquire the share of a co-heir who proposes to transfer his interest in the property or business of the propositus is limited to cases of simultaneous succession and devolution of property upon two or more heirs belonging to Class I. Obviously, the section has been aimed at reducing to some extent at least the inconvenient effects of simultaneous succession by several persons at one and the same time as members of Class I leading to fragmentation and percelling up, of even small holdings of property. To a degree the section enables a co-heir to retain the property in the family and avoid the introduction of a stranger in the enjoyment of family property if he so desired. While clause (1) of section 22 gives the preferential right for the acquisition of interest proposed to be transferred by a co-heir, clause (2) provides for the ascertainment of the amount of consideration or value

payable by the co-heirs who intend to exercise the preferential right, if the co-heirs are unable to agree about the price. If any co-heir who intended to exercise the preferential right, is found not willing to acquire the interest for the consideration determined by Court on application, he cannot be compelled to go through the purchase, but can be made liable to all costs of the application. Clause 3 of section 22 provides that, if there is competition between two or more co-heirs specified in Class I for acquiring the interest proposed to be transferred, that heir who offers the highest price shall be preferred. Having said so much, Parliament could have laid down how and when the right of preference is to be exercised. It is the absence of provisions in this regard, that is pressed by the alienee. The first hurdle in the exercise of the right conferred by the section arises, when a co-heir without reference to the other co-heirs alienates his or her share. Other problems can be envisaged. To mention one, granting that the preferential right can be enforced against the purchaser, the ostensible price at which it has been sold to the purchaser may not be the real price. The deed of sale may show an exaggerated figure or reduced figure for various reasons. Such problems do not trouble us here.

The right conferred is in substance a pre-emptive right. Justice Mahmood in *Gobind Dayal* v. *Inayathullah*[1], while examining the Muslim law of pre-emption quotes Muslim texts to the effect:

> "It is not lawful for any one to sell till he has informed his coparceners who may take or leave it as he wishes; and if he has sold without such information, the coparcener has a preferential right to the share".

The incidents of Muslim law of pre-emption have become crystallized. Statutes relating to pre-emption (See the Agra Pre-emption) Act (XI of 1922) generally provide for the issue of prior notice to the pre-emptors. Provisions are found for ascertainment of the actual price by the Court, when the Court finds that the plaintiff has the right of pre-emption, but that the ostensible price is not the real price. The occasion for the assertion of the right of pre-emption strictly so called, or the cause of action for enforcing the preferential right of purchase as prevalent in several parts of the country, arises only on sale by a co-heir. It has necessarily to be so, as the right is not to compel a sale, but a right to elect to be the purchaser when a sale is proposed. Can the absence of any provision in the Act for the co-heir to pursue the matter, if a person should sell his or her interest without reference to the other heir, conclude the matter against him? If the absence of provision is decisive, then the conferment of the preferential right is futile and absolutely valueless. The very object of enacting section 22 would be defeated. To use the words of Lord Simonds in *Cutler* v. *Wandsworth Stadium Ltd.*[2], 'the statute would be but a pious aspiration.' Let us, therefore, examine the jurisprudential aspect of the matter. The right conferred by section 22 on co-heirs is undoubtedly a valuable right. The section provides that other heirs shall have preferential right to acquire the interest. While one co-heir cannot compel another co-heir to sell his or her interest, if he or she intends to sell his or her interest, the other co-heirs have the statutory right to purchase the interest, if they are prepared to pay the proper consideration. This statutory right necessarily imposes a corresponding duty on the co-heir who intends to sell his or her interest. It is a fundamental principle of our jurisprudence that, where there is a legal right, there is a corresponding duty enforceable by an action in a Court of law. Also *Ubi jus ibi remedium* where there is a right there is a remedy. The expression 'Jus' in the maxim is understood as signifying the legal authority to do or demand something. A legal right is defined by Professor Holland as "a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of another." Unless the section is looked upon as a pious exhortation of Parliament and not a legally enforceable right, the aggrieved co-heir can seek the Court's assistance for the recognition of his right and relief necessary to secure to him that right. A Legislature does not intend its enactment to be a *brutum fulmen*. If a statute creates a duty—here the duty to offer the share—to the co-heirs

1. (1885) I.L.R. 7 All. 775 at 806. 2. L.R. (1949) App. Cas. 398 at 407.

in the first instance is necessarily involved when it is said by the statute that the preferential right arises when a co-heir proposes to transfer his interest—and the statute does not provide or enact a remedy, an action at common law is clearly competent. The duty is not one of imperfect obligation ceasing with its breach. If the right can be extinguished by the wrongful act of the obligor, it cannot be regarded as a right in law.

A reading of the several provisions of section 22 makes it manifest that Parliament intended to give a real right to co-heirs inheriting as Class I heirs. The section gives the non-alienating heirs the capacity of controlling the action of the co-heir who wants to alienate his interest and of compelling him to transfer the interest to them. When the State by Law confers on the co-heirs this right, they are entitled to approach the Courts for the exercise of that control in the manner most effective.

> "Now, the general law as to the remedy of a person who has been injured by the infringement of a statutory right or the breach of a statutory obligation for his benefit is clear. Where the statute has not in explicit terms given a remedy, the remedy which is properly applicable to the right or the obligation flows as an incident", *Dawson & Co.* v. *Bingley Urband Council*[1].

In *Black* v. *Fife Coal Co., Ltd.*[2], Lord Kinnear observed :

> "If the duty be established, I do not think there is any serious question as to the civil liability."

In *Cutler* v. *Wandsworth Stadium Ltd.*[3], Lord Simonds said :

> "For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach."

Thus for there is no difficulty. The next question is to define the legal basis on which the right could be enforced against the stranger purchaser. When interpreting the section, one can properly assume that Parliament had in mind the practice of pre-emption present in the country and the several pre-emption laws. A Legislature may be deemed to be conversant with the laws current within its territory. But that will not permit the adoption of the incidents of pre-emption recognised or provided for in other pre-emption laws, and in the Muslim law of pre-emption.

The right conferred under section 22 (1) of the Hindu Succession Act cannot be enforced and a transfer secured if the alienating co-heir only intends to make a transfer. He or she could, at any time, abandon the proposal for transfer. It will be perfectly open to a person who is negotiating for a sale to a stranger, to withdraw from the negotiations and abandon the proposal for sale or his co-heir intervening to enforce his preferential right purely out of feelings of animosity towards the co-heir. Such conduct is not unknown. A proposal to transfer may become manifest only on an irrevocable act of transfer. It is the sale against the right of the co-heirs that would constitute an infringement of the right conferred under section 22 (1). To repeat the cause of action is a sale to a third party, without reference to the other co-heirs who might have purchased the property for the proper price, if it had been offered. Shall we say that a firm proposal comes into existence *vis-a-vis* the other co-heirs, when execution of the deed of transfer in favour of the stranger is taken up, and *eo instanti* the statutory right of purchase by the other co-heirs attaches itself to the property. Being a statutory incident of property inherited by Class I heirs it could be said that it runs with the land and binds the stranger purchaser. As I read section 22, Parliament must have had in mind the two fold aspect of the right in the pre-emption laws current in the country : (1) the primary or substantive right to have an offer made and (2) the secondary or remedial right of the co-heirs if the property is sold without being first offered to them to take it from the purchaser. In my opinion, Parliament has emphasised upon the primary right of pre-emption.

1. L.R. (1911) 2 K.B. 149 at 159.
2. L.R. (1912) App. Cases 149 at 165.
3. (1949) App. Cas. 398 at 407.

and left the remedial right to the common law for the Courts to mould it according to the circumstances.

In *Audh* v. *Gajadhar Jaipura*[1], Mukherjea, J., (as he then was), referring to the Muslim law of pre-emption, pointed out that the right of pre-emption becomes enforceable only when there is a sale, but that the right exists antecedently to the sale. The correct position of the Muslim law of pre-emption is enunciated in these words :

> "The correct legal position seems to be that the law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owners' unfettered right of sale and compels him to sell the property to his co-sharer......The person who is a co-sharer in the land.......... consequently gets an advantage or benefit corresponding to the burden with which the owner of the property is saddled ; even though it does not amount to an actual interest in the property sold. The crux of the whole thing is that the benefit as well as the burden of the right of pre-emption run with the land and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself."

The enunciation of the legal principle here is not based on any peculiarity of the Muslim law of pre-emption. The obligation on a co-heir to submit to the preferential right of purchase of his co-heir is regarded as a limitation or disability upon the ownership of property, to the extent it restricts the owner's unfettered right of sale. Section 22 of the Hindu Succession Act imposes a restriction or limitation on the co-heir's unfettered right of sale of his interest. On inheritance he takes the property subject to the restriction on his power of sale and the corresponding right in his co-heirs. Referring to the right of pre-emption as generally prevalent when dealing with the Punjab Pre-emption Act which defines the right and provides a procedure for enforcing it, Subba Rao, J., (as he then was) observed in *Bishan Singh* v. *Khazan Singh*[2] :

> "(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (2) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (3) It is a right of substitution but not of re-purchase *i.e.*, the pre-emptor takes the entire bargain and steps into the shoes of the original vendee."

It is useful here to quote a passage from the Judgment of Plowden, J., in *Dhani Nath* v. *Budhu*,[3], referred to by the learned Judge in the case cited above :

> "A preferential right to acquire land, belonging to another, upon the occasion of a transfer by the latter, does not appear to me to be either a right to or a right in that land. It is a *jus ad rem alienam acquirendam*, and not a *jus in re aliena*. The right, title and interest of the owner of land, which is subject to rights of pre-emption, is not qualified or affected by the circumstances that is so subject. The right, title and interest which passes upon a transfer is precisely the same, whether the transfer be to a pre-emptor, or non-pre-emptor, the only difference being that in the latter case the transfer is avoidable at the instance of any pre-emptor. What is really affected by the existence of the right of pre-emption is not the right, title or interest of the owner—but the exercise of the owners' power of transfer.. ....*He is not at full liberty to transfer to whomsoever he pleases............ until he has given the pre-emptor the opportunity prescribed by law to exercise the preferential right of acquisition.*"

The same is the position of the co-heir who inherits as Class I heir under the Hindu Succession Act. The primary or principal right, the right to offer of the thing about to be sold while it is not an interest or right in the property itself, as an inherent right attaches itself to the property. The other rights can follow therefrom as remedial and in enforcement of this primary right, since the preferential right conferred by

1. (1954) S.C.J. 590 : (1955) 1 S.C.R. 70 : A.I.R. 1954 S.C. 417.
2. (1958) S.C.J. 1234 : (1959) S.C.R. 878: A.I.R. 1958 S.C. 838 at 841.
3. 136 P.R. 1894.

law has to be respected and enforced by Courts in accordance with the Legislative intent. There are certain fundamental juridical principles which are necessarily pre-supposed by every statute and which determines when properly applied what legal rights and duties have been violated, and what ought to be done, in order to place those whose rights have been violated as near as may be in same situation in which they would have stood if the laws have been observed and the duties carried out. In Crawfords Construction of Statutes, 1940 Edition, at page 427, quoting Dwamis on Statutes, it is observed :

> "Legislation being the establishment, beforehand, of those general principles by which civil conduct is to be regulated, and jurisprudence, consisting of those principles which are developed in the application of the former to particular cases, it follows, that the latter will be more or less extensive, according as the former is more or less general or particular; jurisprudence being the most extensive when the law is most general, and least extensive when the law goes furtherest into details and particulars. When this is the case, it so far occupies the place which would otherwise be filled with jurisprudence. Jurisprudence, on the other hand, supplying all that Legislation leaves unprovided for in the administration of justice, and developing principles which serve as rules of conduct for cases subsequently arising, so far stands in the place, and performs the functions of legislation."

While Courts do not legislate, a statute can be carried into execution by known rules of law and equity if applicable. To avoid a sale in violation of the preferential right of the co-heirs the Court, without doing violence to the language of the sections, can rely upon the principle of either section 38 or preferably of the 1st part of section 40 of the Transfer of Property Act. The principle of section 38 has been applied to cases where a person is authorised only under certain circumstances to dispose of immoveable property. It has been applied to alienation by a Hindu widow and other limited heirs, alienation by the father in derogation of the rights of his son under the Mithakshara Law and alienation by Mahants and Shebaits. It could be said that a co-heir cannot transfer his interest in the property which he inherited along with the other co-heirs, without reference to the preferential right of the co-heirs. The law which provides for inheritance by co-heirs under Class I limits the freedom of disposal of immoveable property. A co-heir can sell his interest to a person of his own choice, only if the preferential right of his co-heirs to make the purchase is not availed of by them. The 2nd paragraph of section 40 has generally been invoked as providing substantive law and the foundation for specific relief under section 27 (*b*) of the Specific Relief Act, 1877, where there is a covenant for pre-emption, which does not give any interest in his co-heirs' share in the immovaeble property or any easement therein. A co-heir who shares land along with another co-heir gets an advantage or benefit to acquire the latter's interest in common property manifestly for the beneficial enjoyment of his own interest therein, when the latter co-heir seeks to dispose of his interest. A co-heir is thus saddled with a burden and his right of enjoyment as absolute owner free to dispose of his interest to whomsoever he pleases is restrained. Under the first part of section 40 the dominant right of the non-alienating co-heir may be enforced against a transferee for consideration with notice thereof, as the statutory obligation of a co-heir gets annexed to the ownership of the land by reason of his inheritance of the land as co-heir. In the light of the foregoing discussion it follows that the right of a person to transfer his interest in property inherited along with other Class I heirs is subject to the preferential right of his co-heirs to take the transfer, and that any transfer in derogation of that right would be voidable at the instance of the co-heirs who are denied their preferential right.

Learned Counsel for the respondents drew my attention to cases where it has been held that the right of pre-emption is a very weak right and can be defeated by all legitimate methods. But that does not mean that the right is not there to be enforced. The observation in the various decisions that it is open to a stranger vendee of property liable to pre-emption to defeat the pre-emptor's claim by all legitimate means, is consistent with the enforcement of the pre-emptor's claim accord-

ing to law. What is said is that, as the right of pre-emption is a restriction on the normal right of conveyance, it must be exercised with utmost vigilance by the person who avails himself of it, complying strictly with the conditions in regard to its exercise.

There is no question here that the price shown to have been paid for the sale in favour of the 2nd defendant is not the proper price. There has been no discussion before me questioning the reality of the consideration paid for the sale. The passing observation of the Court below that there was a waiver of the right of pre-emption is wholly untenable. It is the case of the plaintiffs that the 1st defendant's husband died 20 years previous to the suit, and that she had left the village and gone to Nilgris where she was living as the mistress of a certain person and had two children by him. The 2nd plaintiff as P.W. 1 deposed that her sister the 1st defendant attended her father's funeral and claimed a share in the properties, and that P.W. 1 told her that she had gone out of the caste. It is said that the plaintiffs then asked her to given the land free, but that she refused. P.W. 2 has deposed that the 1st defendant stated that she was not prepared to sell the property for any price. One thing is, clear that, at the time of the funeral when there was some claim by the plaintiffs, there was no proposal by the 1st defendant to transfer her interest in the property to any one. The question of exercise of preferential right can arise only when there is a proposal to sell the property. There is no evidence that, at any time, to the knowledge of the plaintiffs, there was a proposal for sale. For the first time, the plaintiffs came to know of her intention to sell when she sold the property to the 2nd defendant. To infer waiver of the right, there must be knowledge and an opportunity to exercise the option. There can be no claim of *bona fides* and want of notice by the purchaser in the case, as the right conferred here is statutory and the purchase is of the share of the co-heir shortly after the inheritance opened. The thing speaks for itself. The existence of the right is patent and the burden is upon the purchaser to establish that the other co-heirs declared or waived their preferential right when occasion arose. It is not pretended that the purchaser made any reference to the non-alienating co-heirs before his purchase. It follows that the plaintiffs have not lost their preferential right of purchase by the sale and are entitled to have the property conveyed to them.

In the result there will be a decree for a conveyance of the property. The plaintiffs are given two months' time to deposit in the trial Court the purchase price of Rs. 1,000 paid by the 2nd defendant. The second appeal is allowed accordingly. The parties will bear their respective costs throughout.

Leave granted.

V.M.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

S. Krishnaswamy Pillai .. *Petitioner**

v.

The Deputy Commissioner, Hindu Religious and Charitable Endowments (Administration) Dept., Madurai and others. .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XXII of* 1959)—*Endowments or Kattalais in respect of incorporated and unincorporated Devaswoms—Act applicable—Scheme—Application by trustees of a temples to Deputy Commissioner to frame a scheme in respect of a specific endowment—Power to frame scheme in respect of—Other endowments connected with—Appointment of fit person under section* 64 (4) *pending petition under section* 63 (a)—*Legality.*

The Madras Hindu Religious and Charitable Endowments Act extends to the whole of the State of Madras including the Kanyakumari district and it applies to all Hindu Public Religious Institutions and Endowments except the incor-

*W.P. No. 1307 of 1966. 5th November, 1969.

portated dewaswoms and unincorporated dewaswoms. Endowm in respect of incorporated and unincorporated dewaswoms are als the provisions of the Act.

When an application is made to the Deputy Commissioner trustees of the temple in respect of a specific endowment relating if the Deputy Commissioner came to know of the existence of th ments which are connected with that endowment, it was certain to frame a scheme under section 64 of the Act covering the whol ous endowments and charities.

Where the draft scheme is one to which the petitioner and thre were parties, it is not proper to prohibit the Deputy Commissioner fi with the further consideration of the scheme pending disposal of th by the petitioner under section 63 (3). The Deputy Commissione to take action under section 64 (4).

Petition under Article 226 of the Constitution of India, praying cumstances stated therein, and in the affidavit filed therewith the H be pleased to issue a writ of prohibition restraining the 1st responde proceedings with the framing of a scheme for "Kottar Mahimai Th Subramaniaswamy Vellithambala Kattalai in O.A.No. 66 of 1962 o

V.S. Ramakrishnan, for Petitioner.

K.S. Bakthavatsalam, Assistant Government Pleader, for 1st

K.S. Naidu and *R. Vijayan*, for Respondents 2 to 5.

The Court made the following

ORDER:—The petition claims to be the President of what is cal Mahimai Trust in Kanyakumari district. According to him it came about 200 years ago having been constituted by tobacco merchant three castes from out of the Mahimai collected in respect of purchas tobacco by them. It appears that one of the religious charities for v was contributing was what was called *Uchikala Velli Thambala Kattalai* i Temple. On the ground that the contributions to that *Kattalai* had by the trustees regularly, the trustees of the Tiruchendur temple a Deputy Commissioner, Hindu Religious and Charitable Endowmen tion) under section 64 (1) of the Hindu Religious and Charitable En 1959 for the framing of a scheme. A draft scheme has been prep covers not merely the religious charities above mentioned, but also th gious charities in Kanyakumari district itself. This draft scheme h by four trustees of the trust including the present petitioner. Sub petitioner has filed O.A.No. 58 of 1965 under section 63 (*a*) and (*b*) decide whether these are specific endowments within the scope of the te in the Act. This writ petition, though filed as one for a writ of prohibi the first respondent, the Deputy Commissioner, from proceedings wi of a scheme, the learned Counsel for the petitioner has restricted hi issue of a writ of prohibition directing the Deputy Commissioner t appointing a fit person under the provisions of section 64 (4) of the

Various contentions were raised on behalf of the petitioner. On that as the three other religious charities in Kanyakumari district ar incorporated and unincorporated dewaswoms in Kanyakumari distr governed by Act XXX of 1959, it is not open to the Deputy Commiss a scheme to govern them also. I am afraid this contention has Act XXX of 1959 governs the dewaswoms themselves. They do n kattalais or specific endowments in those dewaswoms. The Madras Hi and Charitable Endowments Act extends to the whole of the State of ing the Kanyakumari district and it applies to all Hindu Public religio and endowments except the incorporated Dewaswoms and unincorp

swoms. It is, therefore, obvious, that endowments or Kattalais in respect of incorporated and unincorporated dewaswoms are also governed by the provisions of this Act.

The second contention is that as the trustees of the Subramaniaswami temple Devasthanam, Tiruchendur, applied for framing of a scheme only in respect of the specific endowment of the *Uchikala Velli Thambala Kattalai* in that temple, it was not open to the Deputy Commissioner to frame a scheme to cover not merely that Kattalai, but also three other religious charities in Kanyakumari district. This contention again has no substance. Under section 64, the Deputy Commissioner can frame a scheme not merely on his being moved to do so, but also of his own motion. The Deputy Commissioner is not a mere quasi-judicial authority who can take action only on being moved to do so by parties. He is also an administrative officer, in charge of the administration of various temples and religious charities and that is why he has been given the power to frame scheme *suo motu*. Therefore, when an application was made before him by the general trustees of the Tiruchendur temple in respect of a specific endowment relating to that temple, if the Deputy Commissioner came to know of the existence of the other endowments, which are connected with that endowment, it was certainly open to him to frame a scheme under section 64 of the Act covering the whole of the religious endowments and charities.

The third objection is that pending decision on the O.A.No. 58 of 1965 filed by the petitioner under section 63 of the Act, it is not open to the Deputy Commissioner to appoint a fit person under section 64 (4). As I have already mentioned the draft scheme is one to which the petitioner and three other trustees were parties. I do not, therefore, think that it is proper to prohibit the Deputy Commissioner from proceeding with the further consideration of the scheme pending disposal of the petition filed by the petitioner under section 63 (3) ; nor do I think there is anything to prevent the Deputy Commissioner taking action under section 64 (4). In doing either of these things, the Deputy Commissioner cannot be said to be contravening any provision of law. There is certainly no question of his not having the jurisdiction to do so.

The Writ Petition is devoid of merits and it is accordingly dismissed. There will be no order as to costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE G. RAMANUJAM.

The Self-Respect Sangam, Erode by President, E.V. Ramaswami Naicker .. *Appellant**

v.

Nagammal .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Scope—Parties making joint endorsement that the principles of Indian Partition Act be applied in respect of property—Court, if has got inherent jurisdiction to direct a sale of properties among the co-sharers.

In the appeal Memo, the joint endorsement by the parties are agreeable to "the principles of the Indian Partition Act are applied in respect of the property". Has the Court got inherent jurisdiction to direct a sale of properties among the co-sharers apart from the provisions of the Partition Act?

Held that, in dividing the property among the co-sharers by metes and bounds, the Court may be confronted with the situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth, in such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the

*S.A. No. 1636 of 1965. 13th November, 1969.

sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by Courts in making an equitable partition of the joint properties either with the consent of the parties or where such consent is not forthcoming, in exercise of its own discretion. Whatever method is adopted, it is only to implement the process of equitable partition. It would well-nigh be impossible for a Court to effectuate a partition on an equitable basis, if it should be held that it is under a legal obligation to divide every item of the joint property *in specie*. Where properties are susceptible of such division, the Court adopts it. Where it is not, it exercises its own discretion in implementing the process of equitable partition. The provisions of the Partition Act do not, in any way, entrench upon the undoubted power of the Court to effectuate a partition between co-owners on an equitable basis.

The Commissioner conducted sale of the property in auction as amongst the parties and the plaintiff was the successful bidder therein. The sale has to be set aside for the reason based upon the violation of rules 188 and 199 of the Civil Rules of Practice in that the commissioner fixed the upset price instead of the Court and sold the property to the plaintiff who was the only bidder present at 5.15 P.M.

Appeal against the Decree of the Court of the Subordinate Judge, Erode, in Appeal Suit No. 4 of 1963, preferred against the decree of the Court of the Additional District Munsif of Erode in I.A.No. 2888 of 1961 in Original No. 58 of 1943.

N. Sivashanmugham, for Appellant.

P.S. Srisailam, for Respondent.

The Court delivered the following

JUDGMENT :—This Secod Appeal came to be filed in the following circumstances:

There was a suit, O.S. No. 58 of 1943, filed by the appellant herein (plaintiff) on the file of the District Munsif of Erode for partition of his 3/4th share in the suit property, which he acquired by right of purchase under two sale deeds dated 4th March, 1942, and 14th May, 1942 against the defendant who claimed the other 1/4th share. There was a preliminary decree for partition on 17th August, 1943. In C.M.P. No. 816 of 1943 a final decree dated 5th April, 1944, was passed by the trial Court in pursuance of the said preliminary decree which allotted the eastern 3/4th share to the plaintiff and the western 1/4th share to the defendant. Against the said final decree, both the parties have filed appeals to the District Court, Coimbatore in A.S.Nos. 305 and 327 of 1944. There was an order of remand in the above two appeals by the District Court on 13th December, 1944 directing the trial Court to consider the second report and the plan filed by the Commissioner before effecting a division of the properties. On remand, the trial Court passed a fresh final decree on 1st November, 1945, dividing the property into 4 blocks as per the Commissionrer's first report and allotting blocks 1 to 3 to the plaintiff and the fourth block to the defendant. There was again an appeal to the Sub-Court, Coimbatore in A.S.No. 13 of 1948 by the defendant and there was the following joint endorsement made by the parties on the said appeal memo.

> "The parties are agreeable to a remand, and the principles of the Indian Partition Act are applied in respect of the property."

On the basis of this endorsement the matter was remanded again to the trial Court for disposal as per the joint endorsement.

Thereafter in I.A. No. 166 of 1949 the plaintiff applied under section 6 of the Partition Act to direct a sale of the properties by public auction. The trial Court, by order dated 27th June, 1949, dismissed the same holding that the said application cannot be taken as one under the Partition Act and that in any event the plaintiff cannot invoke section 6 without his having resort to section 2 at the first instance. There was an appeal against the said order in A.S.No. 34 of 1950 on the file of the Sub-Court but the same was dismissed on 14th July, 1950, as not maintainable. There was a further appeal to this Court in C.M.A. No. 84 of 1951 and the same was also dismissed on 9th October, 1953.

Thereafter the plaintiff filed I.A. No. 2888 of 1961 for passing a final decree by directing the properties to be sold by auction among the co-sharers. The learned District Munsif of Erode by his order dated 24th March, 1962, took the view that the joint endorsement made by the parties in the earlier proceedings will not stand in the way of the plaintiff's application for passing a final decree, that the endorsement was only to the effect that the principles of the Partition Act was to be applied and not that the provisions of the Partition Act has to be applied and that the Court has got inherent power to direct the sale of the properties among the co-sharers in a proper case for the highest price, apart from the provisions of the Partition Act, and in that view he directed that the property be sold by a Commissioner to the highest bidder as between the plaintiff and the defendant with a right to set off his share from the sale price. There was no appeal as against this order. In pursuance of the above order, the Commissioner conducted sale of the property in auction as amongst the parties and the plaintiff was the successful bidder therein. By an order dated 31st August, 1962 the said sale to the plaintiff was confirmed on the plaintiff depositing the sale price. As against the said order dated 31st August, 1962 confirming the sale, the defendant filed an appeal to the Sub Court, Erode in A.S. No. 4 of 1963 which was allowed on two grounds (*i*) that the application for passing a final decree is not maintainable and (*ii*) that in any event, the sale is vitiated by various irregularities. The plaintiff has come forward with the present second appeal aggrieved against the order of the learned Subordinate Judge allowing the appeal, A.S. No. 4 of 1963 and setting aside the sale in favour of the plaintiff.

In this second appeal, Mr. S. Mohan, learned Counsel for the appellant contended that the reasoning of the lower appellate Court that the joint endorsement in the earlier proceedings stood in the way of the petitioner moving the Court for passing a final decree by way of a direction to sell the property among the sharers is erroneous having regard to the fact that the joint endorsement merely directed the parties to follow the principles of the Indian Partition Act and not to apply under a particular provision of the said Act. According to the learned Counsel, there was a difference between saying that the parties agreed to apply the Partition Act and their saying that they agreed to apply principles of the Partition Act and what the parties attempted to do now in these proceedings is to apply the principles of the Partition Act and this is not against the joint endorsement. I find there is some force in the contention aforesaid. The lower appellate Court proceeded on the basis that the trial Court had ignored the joint endorsement, when ordering the application in I.A. No. 2888 of 1961. This does not appear to be correct. The trial Court in fact considered the scope of the joint endorsement and held that the joint endorsement merely directed the parties to apply the principles of the Indian Partition Act and not the provisions of the said Act. The lower appellate Court has not considered the reasoning given by the trial Court for entertaining the petition in the face of the endorsement, before holding that the present application is barred by the joint endorsement as well as by the decision in I.A. No. 156 of 1949 dismissing the application by the plaintiff purported to have been filed under section 6 of the Partition Act. After due consideration of this question, I am inclined to agree with the view taken by the trial Court and hold that the joint endorsement in the earlier proceedings is not a bar to the application in I.A. No. 2888 of 1961. What the petitioner seeks is to invoke the principles of the Partition Act contained in sections 4 and 6 as per the joint endorsement and this does not in any way run counter to the joint endorsement. As I read the joint endorsement, I do not construe it as a direction to the plaintiff to file an application only under section 2 of the Partition Act. If that were the intention, the joint endorsement would have been more specific. In the facts and circumstances of this case, it is difficult to believe that the plaintiff would have put himself under a disability by undertaking to file an application under section 2, for, by filing such an application an advantage is given to the defendant who is a smaller sharer to take the property at a price fixed by the Court under section 3. I do not think that the parties, especially the plaintiff would have contemplated such a situation.

It seems to be by now well settled that the Court has got inherent jurisdiction to direct a sale of the properties among the co-sharers apart from the provisions of the

Partition Act, though there was some divergence of judicial opinion in some earlier cases. In *Basanta Kumar* v. *Moti Lal*[1], it was held that even in cases where section 4 of the Partition Act does not apply, the Court has got jurisdiction to allot the property which is incapable of division to the person in occupation and compensate the other persons in money. In *Debendra Nath Bhattacharjee* v. *Hari Das Bhattacharjee*[2], the correctness of the above decision was doubted and it was expressed that when the nature of the property jointly owned by the plaintiff and the defendant is such that a division of it amongst them cannot reasonably or conveniently be made, the plaintiff has not got the right to claim that the defendant should be compelled to transfer his share to the plaintiff at a valuation, merely because he happened to have possession of the property at the commencement of the action. The learned Judges held that the proper course in that case is to direct a sale of the property amongst the co-sharers, and it should be given to that shareholder who offers to pay the highest price above the valuation made by the Court.

In *Ram Prasad* v. *Mt. Mukandi*[3], the plaintiff who was a 2/3rd sharer requested the Court that a sale may be held and that whoever among the co-sharers offers the highest bid may be given the property. The defendant sought the aid of section 3 of the Partition Act treating the request of the plaintiff as one under section 2 of the Partition Act. The Court held that the provisions of the Partition Act do not apply to the facts of the said case and directed the sale of the property among the co-sharers for the highest amount offered by them outside the provisions of the Partition Act. In *Mohit Krishna* v. *Pranab Chandra*[4], the above decision was relied on and followed. In *Subbamma* v. *Veerayya*[5], Venkatasubba Rao, J., took the view that independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable, for effecting a just partition.

A different note was struck by Byers, J., in *Athappa Chettiar* v. *Somasundaram Chettiar*[6], where it was held that unless there is an application under section 2 or 4 of the Indian Partition Act, the Court has no jurisdcition to impose a forced sale upon the members of the family. The decisions in *Ram Prasad* v. *Mt. Mukandi*[3], and *Mohit Krishna* v. *Pranab Chandra*[4], were commented upon by a later decision of the Calcutta High Court in *Nitya Gopal* v. *Pran Krishna*[7] where a Division Bench of the Calcutta High Court expressed that the Partition Act confers on the Court, in a suit for partition, a power of sale in certain specified cases, and that as such no general power of sale can be spelt out from the provisions of the Act or from the inherent jurisdiction of the Court and that the Courts cannot get round the express terms of the Partition Act by acting outside the provisions of the Act. This decision of the Division Bench was followed by a single Judge of the same Court in a later decision in *Probhat Kumar* v. *Rammohan*[8], where it was held that the Court has no jurisdiction to direct a sale under the Partition Act when there is no request by persons interested in more than a moiety of the properties sought to be divided, to direct a sale and that apart from the provisions of the Partition Act, the Court has no power to direct a sale of the property in a partition action. The power of the Court to direct a sale in a suit for partition was held limited to the cases provided for in the Partition Act.

In *Ramaprasada Rao* v. *Subbaramaiah*[9] a Division Bench of the Andhra Pradesh High Court considered all the decisions above referred to and was inclined to take the view that the provisions of the Partition Act do not, in any way entrench upon the undoubted power of the Court to effectuate a partition between co-owners in one or other of the methods normally adopted in a partition suit and that it is not open to a party to insist upon the Court to follow a particular course contemplated by the provisions of the Partition Act. Subba Rao, C.J., speaking for the Bench expressed:

1. (1911) 11 Indian Cases 370.
2. (1911) 15 Cal. W.N. 552.
3. A.I.R. 1929 All. 443.
4. A.I.R. 1930 Cal. 616.
5. (1932) 61 M.L.J. 552 : A.I.R. 1932 Mad. 647.
6. (1944) 1 M.L.J. 296.
7. A.I.R. 1952 Cal. 893.
8. A.I.R. 1953 Cal. 177.
9. (1957) 2 An.W.R. 488 : A.I.R. 1958 A.P. 15.

"Partition is a legal process by which joint title and possession of co-owners of the entire joint property is converted into separate title and possession of each of the co-owners in respect of specific item or items. The joint property is divided *in specie* and each of the erst-while joint owners is put in possession of specific extent of property, which is allotted to his share. But many contingencies may be visualised when in practice the division by metes and bounds of every item of joint family property is not possible.:.............................
A Court may also be confronted with a situation, namely, that the item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth, in such a case, that item is allotted to one and compensation in money value is given to the other and if such a course is not possible it is sold outright and the sale proceeds divided between the joint owners. All the aforesaid and similar other methods are adopted by Courts in making an equitable partition of the joint properties either with the consent of the parties or where such consent is not forthcoming, in exercise of its own discretion. Whatever method is adopted, it is only to implement the process of equitable partition. It would well-nigh be impossible for a Court to effectuate a partition on an equitable basis, if it should be held that it is under a legal obligation to divide every item of the joint property *in specie*. Where properties are susceptible of such division, the Court adopts it. Where it is not, it adopts one or other of the alternative methods narrated above. The provisions of the Partition Act do not, in any way, entrench upon the undoubted power of the Court to effectuate a partition between co-owners in one or other of the methods suggested above. Before the Act, a party had no right to insist upon the Court to follow a particular course in the process of partition or to insist upon purchasing the share of the other co-owner under certain circumstances."

Referring to the decisions of the Calcutta High Court laying down the principle that Court has no power apart from the provisions of the Partition Act to direct a sale of the properties in a partition suit, they expressed their specific disagreement. With respect I adopt the same reasoning given by Subba Rao, C.J., in the said decision and hold that in this case the plaintiff (appellant) was entitled to move the Court for passing a final decree after directing a sale of the property to the highest bidder as among the sharers. Therefore the decision of the lower appellate Court that the application filed by the plaintiff for passing a final decree was not maintainable and that the same is barred by *res judicata* cannot be accepted as correct.

But the lower appellate Court has given another reason for setting aside the sale confirmed in favour of the plaintiff by the trial Court. It held that there were many irregularities in the conduct of the sale by the Commissioner. The lower appellate Court held that the Court which has got the duty to fix upset price has not done so in this case and allowed the same to be fixed by the Commissioner, contrary to rules 199 and 200 of the Civil Rules of practice. It was also found that the Commissioner conducted the sale at 5-15 P.M. which according to the defendant is contrary to rules 188, 193, 197 and 200 of the Civil Rules of practice. Rule 188 provides that all sales by Court shall begin at noon, and the sale of any lots, not put up before 5 P.M. shall be adjourned to noon on the next Court day. Rule 197 of the Civil Rules of practice enables the Court to appoint a person other than an Officer of Court to sell the property. But though rule 197 does not refer to the procedure to be followed in the conduct of the sale by the Commissioner appointed by the Court, he is bound by the procedure provided in rule 188 of Civil Rules of practice aforesaid. Further rule 200 directs the Commissioner to conduct the sale in the manner prescribed by the Code of Civil Procedure. In view of these provisions, the lower appellate Court held that the conduct of the sale by the Commissioner after 5 P.M. and the fixation of upset price by the Commissioner himself just prior to the sale has vitiated the sale.

The lower appellate Court also held that reasonable time has not been given to the bidders to come and bid at the sale. Notice has been issued by the Commissioner in this case on 23rd July, 1962, notifying the sale on 30th July, 1962. In this case the sale has been directed to be conducted among the two cosharers and it is

only the defendant who has to attend the auction sale in addition to the plaintiff and in the circumstances, it cannot be said that one week's notice given by the Commissioner was insufficient or unreasonable.

Of the reasons given by the lower appellate Court as invalidating the sale, I accept only the reason based upon the violation of rules 188 and 199 of the Civil Rules of practice in that the Commissioner fixed the upset price instead of the Court and sold the property to the plaintiff who was the only bidder present at 5-15 P.M. I do not consider the other reasons as in any way constituting an irregularity in the sale. The sale having been conducted beyond the hour fixed under rule 188 of the Civil Rules of practice, on the basis of an upset price fixed by the Commissioner himself the sale cannot be said to be valid and the same has to be set aside. The trial Court has to therefore conduct a resale of the property among the sharers in pursuance of its earlier order dated 24th March, 1962, and pass a final decree after such sale.

Finally, I have to consider one other contention raised by the learned Counsel for the appellant before me. The order directing the sale of the property was passed on 24th March, 1962, but the same was not challenged in appeal. After the sale of the property by the Commissioner, there was a final order passed by the trial Court confirming the sale and passing a final decree. It is against the later order the defendant filed an appeal to the lower appellate Court and it was argued before the lower appellate Court that in an appeal filed against the later order, the correctness of the order passed by the lower Court on 24th March, 1962, cannot be challenged as it has been allowed to become final. But this contention was negatived by the lower appellate Court holding that in an appeal filled against the later order, the appellant can raise all his objections even though they may relate to the findings recorded in the order dated 24th March, 1962. Having regard to the nature of the orders passed on 24th March, 1962 and 31st August, 1962, I agree with the view taken by the lower appellate Court and hold that the defendant can raise all objections relating to the earlier order dated 24th March, 1962, in the appeal which he had filed against the order dated 31st August, 1962.

In the result, I allow the appeal in part and remand the matter to the trial Court for conducting a fresh sale between the sharers in accordance with law and in pursuance of its order dated 24th March, 1962, and for passing a final decree on the basis of such a sale. In the circumstances, I make no order as to costs. No leave.

V.M.K. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE T. RAMAPRASADA RAO AND MR. JUSTICE G. RAMANUJAM.

Eastern Photo Studio and Eastern News Photo Service .. *Petitioner**

v.

The State of Madras represented by the Assistant Commercial Tax Officer .. *Respondent.*

Madras General Sales Tax Act (I of 1959), section 2 (n)—Sale—Taking Photographs by assessee, an artist and photographer, and supplying to customers—Element of sale involved—Exigibility to tax.

The assessee, carrying on an avocation as camera artist and photography, gather assignments from customers for the purpose of taking photographs. In the course of such an avocation it necessarily purchases photographic films, papers, chemicals, mounts, albums, etc. from other photographic dealers and

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*W.P. Nos. 1753 of 1965 and 3014 of 1966. 25th November, 1969.

makes use of them in the course of its avocation. On the question whether any element of sale is involved in the transaction,

Held, the essence of the deal is a sale of a finished product and not a case where work and labour alone is involved. The trade involves the production of a marketable commodity, though it may be of interest to particular person concerned. A commercial activity is reflected in the entire process. When a customer approaches a photographer and wants him to take a photograph and pays for it, and the copies therefrom, no skill is involved and even if involved, it bears an infinitesimally small proportion to the totality of the bargain.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue writs of *certiorari* calling for the records (*i*) in M.G.S.T. No. 2791 of 1959-60 before the Assistant Commercial Tax Officer, Mannady East section, Madras, and quash the order dated 30th March, 1965 passed therein and communicated with the notice of even date and (*ii*) in A.P. No. 17 of 1960 M.G.S.T. No. 11309 before the Assistant Commercial Tax Officer, Mannady East Division, Madras, and quash the summons dated 30th November, 1966, issued therein respectively.

B. Soundarapandian and *R. Desikan*, for Petitioner.

The Assistant Government Pleader, *K. Venkataswami*, for Respondent.

The Judgment of the Court was delivered by

Ramaprasada Rao, J.—In these two Writ Petitions the petitioner is Eastern Photo Studio and Eastern News Photo Service, which is a partnership concern carrying on an avocation as camera artists and of photography. They gather assignments from their customers which are entrusted to them and particularly for the purpose of taking photographs in meetings, functions, parties, events, etc. In the course of such an avocation of the petitioner, it necessarily purchases photographic films, papers, chemicals, mounts, albums, etc., from other photographic dealers and makes use of them in the course of its profession or avocation. Its case is that it is not a dealer in photographic materials. The petitioner urges that taking of photographs is a work of art and not the result of a mere mechanical process. Skill is required in selecting suitable artistic angles, in making correct exposures, and also in the development of negatives with proper control of time and temperature, and in making enlargements of such photographs, if it becomes necessary, keeping an eye on composition etc. It is stated that the totality of the undertaking by the petitioner involves only labour and exercise of due diligence and care and therefore the undertakings of the petitioner, as set out above, are purely contracts for work and labour. The petitioner denies that there is any element of sale of any material and much less photographic materials when it so carries on its avocation, and its works being creations of art, it ought to be exempted and cannot be called upon to pay any sales tax in respect of such dealings. In fact, the petitioner, though it was carrying on business from the year 1959-60, was firmly of the view that its transactions would not attract tax and therefore it did not even submit a return. But on 31st October, 1964, the petitioner enquired whether there was any cause for its turnover being assessed to sales tax and it was the self-enquiry on its part which provoked the Revenue to call upon the petitioner to submit its accounts from the date when it started its business. On 30th March, 1965, the petitioner produced certain entries relating to its business transactions for the period commencing from 1st January, 1960, and ending with 31st March, 1960. As no further material was placed before the assessing authorities, the taxing officer, after considering the merits of the contentions of the petitioner that no sale was involved in the bargain, ultimately held the view that every transaction of the petitioner in the course of its business involved a sale and therefore estimated the turnover of the petitioner for the whole year on the basis of the part material produced by the assessee for the period as above. W.P. No. 1753 of 1965 is to quash the order of the Assistant Commercial Tax Officer, Mannady East section, Madras, dated 30th March, 1965, by the issuance of a writ of *certiorari*. In W.P. No. 3014 of 1966 the

petitioner is seeking for a similar writ, but to quash the summons dated 30th November, 1966, issued by the same officer in relation to the dealings or transactions of the petitioner.

Learned Counsel for the petitioner urges that on an overall consideration of the merits and the aspects of the transactions involved in by the petitioner it would appear that there is no element of sale in them, and as a matter of fact what is done by the petitioner in the course of its exercise of its profession is only to bring out a product of art and pass it on for consideration to the relevant customer who initiates the process. It is also urged that as photography involves the exercise of skill and diligence, it has to be necessarily treated as a work of art, and so treated, the transactions of the petitioner can never take colour as transactions of sale. Reliance was placed upon the decision in *D. P. Roy Chowdhury* v. *State of Madras*[1]. It has also contended that under rule 5 (3) of the Madras General Sales Tax Rules, 1959, the contract for supplying photos exposed by the photographer himself having been treated and characterised by the executive as a works contract, it is not open to the Revenue as at present to treat such dealing as equivalent to a sale.

We shall now take up the last contention. A given transaction has to be adjudged on its own merits without reference to its antecedent history and particularly without having regard to the view held by the executive at one time regarding its nature. For what reasons a photographic business was considered to be a works contract are not clear. But it is a fundamental norm of interpretation of words in a statute that it should be explained away and understood in the light of the facts relating to it and connected with it. It is therefore not availing for the petitioner to contend that since at one time the transactions of a photographer in taking photographs of others were treated as works contracts, they should be dealt with as such irrespective of any other conspicuous feature present in them. We are of the view that the transactions in question, as in any other case, have to be viewed afresh in the light of the facts and material available on record and necessary inferences drawn therefrom as to their nature and character, in the light of the existing law. We are not therefore persuaded to agree to the contention of the learned Counsel for the petitioner that the transactions in question ought to be *ipso facto* dealt with and treated as contracts of work and labour because they were viewed at some earlier point of time as such contracts.

The other contention is rather attractive and interesting. The case of the petitioner is that notwithstanding the user of photographic materials in the process of taking of photograph and multiplying it by a mechanical process for taking copies thereon, yet at the initial stages a certain degree of skill is required and it pervades the process throughout and therefore the resultant product must be treated as a product of work and art and not as one which was the subject-matter of the bargain in a sale between the photographer and his customer. No doubt a certain amount of skill or expertise is required for an experienced photographer to take pictures. But this is not the only criteria to judge whether the product of photography is a work of art or skill. It cannot be said that any aesthetic or artistic tests or occupation is involved in the avocation of a photographer. It is in the course of its business, in any event that it is called upon to take photographs of particularised objects at the wish and on the assignment of a particular customer. The substance of the trading activity of a photographer consists in bringing out a finished product, namely a photograph from the negative. The materials used in the process are ingrained in the finished article and form part and parcel of it and not a mere ancillary or collateral material appurtenant to the contract. In this view, it appears to us that it is not an absolute necessity for a photographer to be a dealer in photographic materials as well. Without being a dealer in such material he can be a photographer, for he could secure the same from others. If he trades in such materials as well, it would add to his business convenience. But the fact remains that the vocation of photography is not interlocked or interlaced with his dealings in

1. (1962) 13 S.T.C. 866.

photographic materials. In the ultimate analysis the trade involves the production of a marketable commodity, though it may be of interest to particular persons concerned. We are however satisfied that a commercial activity is reflected in the entire process. It is not a case of work and labour. When a customer approaches a photographer and wants him to take a photograph and pays for it, and the copies therefrom no skill in involved, and even if involved, it bears an infinitesimally small proportion to the totality of the bargain. The essence of the deal is a sale of a finished product and not a case where work and labour alone is involved. In *D. P. Roy Chowdhury* v. *State of Madras*[1], Veeraswami, J., as he then was, dealing with a case of the supply of two bronze casts to the State Government. Those casts were not pieces of sculpture which were being forged by the assessee there regularly and with a commercial motive behind it. In that case the learned Judge expressly pointed out that the primary element which was lacking in that case was the trade or commerce in the transaction. There the assessee was a well-known sculptor. The two bronze casts were the statute of Mahatma Gandhi and the other the "Triumph of Labour." On the question whether the petitioner was liable to sales tax on the value of such transactions recovered by him from the State Government, the learned Judge held on the facts that the petitioner was not a dealer, and in supplying those two pieces of sculpture, he did not effect sales of them in the course of trade or business in such casts. But reliance is placed upon a passage, at page 889, appearing in the said judgment which reads as follows:—

> "Another test, or way of looking at the problem, may be to see whether the articles produced has such a general market or it will be useful or valuable only to the person who places an order for its production."

The latter portion of the observation is pressed into service, but torn from its context. The entire case revolved on the essential fact that the Court there was dealing with two pieces of art and sculpture and it is in the light of such facts the test referred to was laid by the learned Judge. In the instant case, however, though the photograph may be useful to the person who places an order for its production, yet as already stated, it is not a piece of art or the product of skill, but it appears to us to be the result of a mechanical process which a photographer indulges in at the behest of his customer.

The case under review, however, squarely falls within the ratio of the decision of a Division Bench of our Court in *B. V. Bhatta* v. *State of Madras*[2], There the petitioner was having a photo house and the question raised was whether the supply of photos and photo copies by a professional photographer to his customers was really an execution of a work of art and whether the bargain by the photographer with his customers was really a bargain for work and labour and not sale of specific goods or chattel. Ramakrishnan, J., speaking for the Bench, after elaborately considering the judicial precedents both in India and elsewhere, came to the conclusion that in almost all cases, the question whether the concept of sale is present in a given case will be primarily a question of fact. He added that when a customer, who goes to a photographer's studio and engages the photographer's services to take a picture, he is bargaining not merely for the special skill which the photographer has, to produce a negative, but also to supply from that negative as many copies of the finished positives as the customer may require. The contract in such a case is a contract for sale of goods and not a contract for work and labour. To complete the discussion, it would be more useful to quote the pithy expression of the learned Judges of the Australian Court in *Federal Commissioner of Taxation* v. *Riley*[3], where the learned Judges observed, noticing a transaction similar to that in the instant case:

"That the transaction is a sale is not, and doubtless could not be disputed." In fact, the learned Government Pleader brought to our notice two other decisions of two different High Courts, one of the Bombay High Court and the other of the

1. (1962) 13 S.T.C. 866.
2. (1965) 16 S.T.C. 441.
3. 53 C.L.R. 69.

Patna High Court reported respectively in *Chelaram Hasomal* v. *State of Gujarat*[1], and *M. Ghosh* v. *State of Bihar*[2], which also take a view similar as that taken by this Court in *B. V. Bhatta* v. *State of Mardas*[3].

In the light of the discussion as above and the prevailing precedents we are of the view that the contention of the petitioner that its dealings resulting from work and labour is not acceptable to us. The Writ Petitions therefore fail and they are dismissed; but there will be no order as to costs.

V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Sivarama Pillai and others .. *Appellants**

v.

Marichami Pillai .. *Respondent.*

Co-owners—Partition—Equal division of Properties having equal rights to take water from the well kept in common, for irrigation—One party to take water from the well for three days and the other the next three days thereafter—No right to use water for irrigating other lands—Right to take water inseperably connected with the lands—Proof of damage, not necessary—Injunction, granting of.

When a well or some source of irrigation irrigates lands belonging to several persons, the source of irrigation cannot be divorced or dissociated from the lands. Irrespective of the question of damage, the plaintiff would be entitled to an injunction on the simple ground that the latter has no right to use water for irrigating other lands and the right to take water from the well is inseprably connected with the lands. The uniform trend of the decisions of this Court is all one way, *i.e.*, not to permit the co-owner to irrigate any land newly acquired by him.

On facts held, it is crucial to bear in mind that the three days in the week fixed for the turn is not in the abstract, a mere division of the water contents, *i.e.*, so many gallons of water but it is essentially a right to irrigate the lands allotted to the respective branches flowing from their right of ownership in the land. It is implicit in such arrangements that the common source of irrigation, the well is kept in common for the only purpose of irrigating the lands which are allotted to the respective branches and to serve that purpose only, leaving out of account the other incidental purposes. The scheme of the arrangement cannot admit of any notion of the parties being entitled to a particular quantity of water (so many gallons) treating that alone as a distinct item of property, divorced from the lands. The well is set apart as common property for the most beneficial and profitable enjoyment of the land and it does not matter what label the parties give to their rights in the well, whether it is a right to a particular share in the well or whether a right to take water by turns. But what is crucial is that in the case of lands, valuable right is the source of irrigation.

There is, however, nothing to prevent the parties from entering into an arrangement which would be very unusual and extraordinary that the arrangement was merely a division of the water in the well in the abstract with right to use the water in any manner they liked to irrigate any lands they liked. It is for the parties to plead and establish such as unusual agreement. Otherwise the right in the well will be inseparably connected with the land. Independently of any question of damage, the plaintiff will be entitled to an injunction restraining the defendants from taking water for irrigating other lands. This limit or fetter on the defendant with regard to the use of the water from the well equally applies to the plaintiff who too cannot take water for irrigating the lands newly acquired by him.

1. (1965) 16 S.T.C. 1021.
2. (1961) 12 S.T.C. 154.
3. (1965) 16 S.T.C. 441.

* S.A. No. 1770 of 1965. 29th October, 1969.

Venkatarama Sastri v. *Venkatanarasayya*, A.I.R. 1929 Mad. 25, followed.

Ramachandra v. *Venkatachala*, I.L.R. (1963) Mad. 86: A.I.R. 1962 Mad. 498, not followed.

Appeal against the Decree of the Court of the Subordinate Judge, Dindigul in Appeal Suit No. 100 of 1964, preferred against the decree of the Court of the District Munsif of Periyakulam in Original Suit No. 129 of 1963.

K. S. Desikan and *K. Raman*, for Appellants.

T. P. Gopalakrishnan and *R. Kanakasabai*, for Respondent.

The Court delivered the following

JUDGMENT:—This second appeal arises out of a dispute between owners of adjacent lands who also had joint rights in a well. The family of the plaintiff and defendants 1 and 2 (hereinafter referred to as the defendants) owned certain items of lands of a total extent of 4 acres and 17 cents which were irrigated by a well situate in the lands. Under a partition arrangement of the year 1952, the properties were divided equally and two items of lands of total extent of 2 acres 3 cents were allotted to the plaintiff and 2 acres and 14 cents were allotted to the defendants. It is common ground that as an integral part of this partition arrangement, both the branches would have equal rights to take water from the well and that that right should be worked out by the plaintiff taking water from the well for three days and the defendants in the next three days thereafter, (not even a case of one party taking for four days and the other party three days in the week). In the nature of things, a well cannot be divided by metes and bounds and persons who own joint rights in a well (to the right of the water in the well) can enjoy that right either jointly or separately only by resort to a workable arrangement safeguarding and securing the right to irrigate the lands allotted to the respective branches. The complaint of the plaintiff is that in 1960, the defendants newly purchased two items of lands on the west of a total extent of 99 cents and irrigated the same from the well in question and that this act of the defendants abstracting water from the well for irrigating the lands newly acquired had resulted in a substantial diminution of water and thus seriously interfered with the plaintiff's right to take water from the well during his turn. This was the plaintiff's complaint in the notice issued on his behalf which preceded the suit. In the reply notice sent on behalf of the defendants, they did not traverse the plaintiff's case of the injury or damage sustained by him; the defendants accepted the fact of their having taken water from the well to irrigate the lands newly acquired by them but rested their claim on a panchayat at which it was settled that the defendants would be entitled to take water for irrigating the lands newly acquired and that the plaintiff would also be similarly entitled to take water to irrigate certain lands on the west which he too acquired. In the course of the trial the defendants desired a local inspection of the property and the well in question as the inspection would reveal that water from the well was being used to irrigate the lands newly acquired by the plaintiff as well as the defendants, a circumstance which would corroborate the case of the panchayat put forward by the defendants. It is in connection with this and for other purposes, a Commissioner was appointed by the trial Court to inspect the property and the Commissioner submitted a report, Exhibit A-5 with a plan, Exhibit A-4. The trial Court upheld the contentions of the defendants and dismissed the plaintiff's suit. But on appeal, the lower appellate Court came to a contrary conclusion. It did not accept the case of the panchayat; it also held that the right to take water from the well was inseparably connected with the lands which formed the subject matter of the partition arrangement, that the lands cannot be dissociated from the well and that the defendants had no right to take water to irrigate the lands newly acquired by them. Hence the second appeal by the defendants.

Learned Counsel for the appellants, Mr. K. S. Desikan, raised two points: (1) A person who has got a joint right in a well along with others (in other words a

co-owner of a well) is entitled to use the water from the well to irrigate any land he likes, whether originally owned or newly acquired by him, so long as the co-owner conforms to the working arrangement already entered into between the several co-owners as to how and in what manner they should take water from the well, whether their rights are defined in terms of shares or in terms of turns. In other words, according to learned Counsel so long as the defendants in this case did not exceed the three days in their turn they can use the water not only for irrigating the lands of an extent of 2 acres 14 cents allotted to them but also the lands on the west newly acquired by them. The substance of the argument is that the right is to the quantity of water which the defendants can take from the well during their turn of three days and it does not matter in what manner the defendants use that water; and (2) unless the plaintiff alleges and proves that as a result of the defendants' taking water to irrigate other lands, there has been a substantial diminution in the supply of water to which the plaintiff would be entitled in his turn, the plaintiff will not be entitled to an injunction on the ground of infringement of some legal right in the abstract. In other words, the mere act of the defendant abstacting water to irrigate other lands would not by itself furnish a cause of action to the suit but there should be proof of the actual injury or damage sustained by the plaintiff. Learned Counsel stressed the point that in this case there is neither pleading nor evidence to that effect and that the Courts below have not even recorded any finding in favour of the plaintiff that he had been damnified in any manner.

Learned Counsel on both sides invited my attention to some of the relevant decisions (to which reference would be made presently) which have laid down the principles governing the rights *inter se* of persons who own joint rights in a well. Mr. T. P. Gopalakrishnan, learned Counsel for the respondent stressed the point that it is settled law that in a situation like the instant case, well (the right to take water from the well) cannot be dissociated from the land, that the well and the land are inseparably connected and that it is necessarily implicit in the very partition arrangement that the well (that is the water in the well) was set apart and was intended to be used and used only for the lands which were previously irrigated by this common well prior to the partition and that none of the parties would be entitled to take water from the well to irrigate any other land. The decisions to which he drew my attention completely support this contention and I am of the view, the matter is not open to any argument contra in view of the clear pronouncement in the Bench decision of this Court, *Venkatarama Sastri* v. *Venkatanarasayya*[1], which has been followed in the subsequent decisions. It is hardly necessary to mention that this Bench decision is binding upon me; with respect, I am also add that the principle enunciated therein is correct. Before I refer to the decisions, it is necessary to emphasise even at the threshold that prior to the division, the well in question was set apart and was used for irrigating the total extent of 4 acres and 17 cents. Naturally when the properties were divided into equal shares, the appurtenant inseparable right to water is provided and the well not being capable of division by metes and bounds was not divided but the right to take water from the well was settled by a workable arrangement each party taking water for three days in the week. It is crucial to bear in mind that the three days in the week fixed for the turn is not in the abstract, a mere division of the water contents, *i.e.*, so many gallons of water but it is essentially a right to irrigate the lands allotted to the respective branches flowing from their right of ownership in the land. It is implicit in such arrangements that the common source of irrigation, the well, is kept in common for the only purpose of irrigating the lands which are allotted to the respective branches and to serve that purpose only, leaving out of account the other incidental purposes like bathing, washing clothes, taking water for cattle, etc. The scheme of the arrangement cannot admit of any notion of the parties being entitled to be particular quantity of water (so many gallons) treating that alone as a distinct item of property, divorced from the lands. The well is set apart as common property

1. A.I.R. 1929 Mad. 25.

for the most beneficial and profitable enjoyment of the land and it does not matter what label the parties give to their rights in the well, whether it is a right to a particular share in the well or whether a right to take water by turns. But what is crucial is that in the case of lands, valuable right is the source of irrigation.

There is, however, nothing to prevent the parties from entering into an arrangement which would be very unusual and extraordinary that the arrangement was merely a division of the water in the well in the abstract with right to use the water in any manner they liked to irrigate any lands they liked, for a matter of that, even use the water for any other purpose. It is for the parties to plead and establish such an unusual agreement. Otherwise the right in the well will be inseparably connected with the land. At this stage it is necessary to mention that the defendants were fully alive and conscious of the fact that as a result of the partition arrangement they would not be entitled to irrigate the lands newly acquired by them and that was the reason why they put forward the theory of panchayat which alone would give them this right but they failed to make out that panchayat. I am adverting to this fact only to indicate that the intention of the parties is very relevant; the conduct manifested by the defendants in setting up a case of panchayat proves that so far as the parties are concerned they accepted the position that the arrangement of 1952 by itself would not confer this right to irrigate other lands.

The first decision to which reference may be made is the decision of Satyanarayana Rao, J., reported in *Nanjappa Goundan* v. *Ramaswami Goundan*[1], in which the facts were identical. In that case, under a partition arrangement between two co-sharers it was agreed that the water from a well should be enjoyed in equal shares by the parties, one party drawing water from the southern side of the well and the other from the northern side. The claim of one of the co-owners to take water from the well to irrigate some other lands newly purchased by him was negatived and it was held the rights in the well cannot be dissociated from the lands to which the well was attached and the co-owner was not entitled to divert the water for irrigating other lands. In that case, the situation of the lands admitted a working arrangement of the right to irrigate, one party taking water from the southern side of the well and the other from the northern side. That is only an incidental aspect of that arrangement. In the instant case, on account of the level and slope of the lands and other considerations such an arrangement is not feasible (*see* the plan Exhibit A-4) and the water could be taken only by turns. The working arrangement with reference to the south, north, east or the west of the well is not a feasible arrangement. This decision is clear authority for the position that the well is inseparably connected with the ownership of the lands and that the rights in the well cannot be dissociated from the lands. In other words, the rights to the water in the well are co-extensive with the rights of the particular party to irrigate the lands. Satyanarayana Rao, J., followed the Bench decision in *Venkatarama Sastri* v. *Venkatanarasayya*[2], as well as the unreported decision of Chandrasekhara Aiyar, J. There are two unreported decisions of Chandrasekhara Aiyar, J., one in *Ammanna* v. *Ramanna*[3], and the other in Second Appeal No. 1640 of 1943. I sent for and perused the original judgment in both the second appeals; Chandrasekhara Aiyar, J., has followed and applied the principle laid down in *Venkatarama Sastri* v. *Venkatanarasayya*[2]. In both the cases, Chandrasekhara Aiyar, J., has held that the ownership of the parties in the well is inseparably connected with the lands which they were previously owning as co-owners and it would not be open to one of the co-sharers to take the water to irrigate some other lands. In S.A. No. 1640 of 1943, the facts were almost identical as in the instant case. The family owned certain lands in three survey numbers along with a well in some other survey number, which was irrigating these lands. There was a partition arrangement coupled with a convenient arrangement for taking water to irrigate the lands. There too the defendants claimed a right to take water to any land of theirs so long as it did not exceed their share but that claim was negatived. After extracting some obser-

1. (1951) 2 M.L.J. 343.
2. A.I.R. 1929 Mad. 25.
3. (1946) 1 M.L.J. 24 (short notes).

vations of the Bench decision in *Venkatarama Sastri* v. *Venkatanarasayya*[1], Chandrasekhar Aiyar, J., observed as follows :

"These observations apply in full force to the facts before us. The joint ownership of the well in S. No. 144 is an incident to the joint ownership of that S. No. 144 and S. Nos. 145, 146 and 147. Acts of enjoyment referable to their ownership must necessarily appertain to the ownership of those lands. They cannot relate to or follow the ownership of any other land or lands. Any infraction of this joint right or ownership must be prohibited by an injunction even though no damage be proved as pointed out in the case just now referred following *Kanakayya* v. *Narasimhulu*[2]".

This decision is clear authority against the defendants on both the points raised by them. In the other case S.A. No. 567 of 1945, the facts were rather curious, in that the plaintiff who had an 1/12th share in a well to irrigate certain lands which were originally kept joint but divided subsequently sold away that land and purchased some other lands. He claimed that he was entitled to his right to an 1/12th share in the well to irrigate the land newly acquired by the plaintiff. Curiously enough, the defendant conceded the position that even though the plaintiff had sold away the land which was originally irrigated by this well, the plaintiff still retained his right to an 1/12th share in the well. In view of that concession, certain directions had necessarily to be given to work out the right of the plaintiff to an 1/12th share in the well and the right of the defendant to the remaining share. But what is crucial for our purpose is the clear expression of opinion by the learned Judge again following the principle of the Bench decision in *Venkatarama Sastri* v. *Venkatanarasayya*[1], that the right to take water from the well is inseparably connected with the land in question and a co-owner cannot take water to a land newly acquired by him. If any relief was afforded to the plaintiff in that case to irrigate other lands, it was so awarded purely because of the concession made by the defendant that the plaintiff still owned and retained a right to an 1/12th share in the well totally dissociated from the land. Chandrasekhara Aiyar, J., observed as follows :

"If for any reason a man loses his right in the joint lands, to the ownership of which lands the right to use the well water is incident or appurtenant, he cannot insist on his right to take the water to some other property, the two rights being so intimately connected and inter-dependent. This is what was laid down in S.A. No. 1640 of 1943, following the decision in *Venkatarama Sastri* v. *Venkatanarasayya*[1]."

It is important to notice that the learned Judge pointed out that if any right in the co-owner to irrigate other lands were to be recognised, it would virtually amount to an infliction of a burden or an obligation in the nature of an easement in favour of one co-owner as against the other and that there was no warrant in law for any such burden or obligation being imposed.

I shall now refer to the earlier Bench decision of this Court in *Venkatarama Sastri* v. *Venkatanarasayya*[1], the principle of which was followed by Satyanarayana Rao, J., and Chandrasekhara Iyer, J., in the decisions referred to earlier. In that case, several co-sharers of an agraharam were entitled to the water of a tank in the same proportion in which they owned lands in the agraharam and all of them have been cultivating certain area of the land described as wet ayacut under the tank. One of the co-sharers used the water of the tank to convert some of his dry land into wet land and thereby caused damage to the other co-sharers, who filed a suit for injunction to restrain such wrongful use and also for damages. The Bench held that the right or ownership to the water in the tank was not independent of the ownership of the land and negatived the claim of the co-sharer that each co-sharer is entitled to a defined share in the water of the tank divorced from the particular share of the land to which he

1. A.I.R. 1929 Mad. 25. 2. (1896) I.L.R. 19 Mad. 38.

was entitled. The argument that the co-sharer is entitled and is at liberty to use water in any manner he chooses so long as he does not exceed the quantity appertaining to his share in the well in the sense that the ownership of the water is not necessarily connected with the ownership of the land was not accepted. The Court observed as follows :

> " The argument overlooks a cardinal fact that whereas it is undoubtedly true that agraharamdars own the water of the tank in the same proportion as they own the lands irrigated by that water it by no means follows from this, that their ownership of the water is unconnected with their ownership of this land.
>
> For instance, if one acre out of this area of 53 acres passes into the hands of an individual, his right to the water may in a sense be described as being 1/53 of the tank water. It does not, however, follow from this, that he may take from the tank 1/53 of the water in it and use it for any purpose he likes. In our opinion, the evidence clearly shows that the enjoyment of the land irrigated by the tank and the enjoyment of water of the tank are interdependent."

On the facts of that case it was found that the plaintiff co-sharer had sustained injury (diminution in the supply of water) on account of the other party using the water in the tank for irrigating dry lands. But independently of that finding, the Bench applied the principle of the Bench decision of this Court in *Kanakayya* v. *Narasimhulu*[1] and held that the plaintiff co-sharer will be entitled to an injunction even if no damage was proved. I am of the clear view that this Bench decision is direct authority for the position that when a well or some source of irrigation irrigate lands belonging to several persons, the source of irrigation cannot be divorced or dissociated from the lands, this Bench decision cannot be distinguished on the ground that it related to rights of agraharamdars in a village because the entire discussion and the reasonings are based upon rights of the argraharamdars as " private rights " of ownership to the land with similar "private appertaining rights " thereto, a right to take water. From the foregoing it will be seen that the uniform trend of the decisions of this Court is all one way, *i.e.*, not to permit the co-owner to irrigate any land newly acquired by him. The decision of Somayya, J., reported in *Lingappa Goundan* v. *Ramaswami Goundan*[2], as well as my recent decision reported in *Karuppa Goundar* v. *Muthuswami Goundar*[3], do not touch this aspect. In those decisions it was held that it was not open to one co-owner to compel the other co-owners to take water from the well in any particular manner and that it will be open to the latter to take water from the well either by baling or by using piccottahs or by installing a pump set. In both the decisions, there was no question of one co-owner attempting to irrigate any other land and the only question was whether the co-owner was compellable to follow any particulr method of irrgiation. It only remains to refer to the recent judgment of Anantanarayanan, J., as he then was, reported in *Ramachandra* v. *Venkatachala*[4], on which Mr. K. Raman for the appellant placed considerable reliance. I have perused the decision with care and I am of the view that the decision in that case turned upon the inference which the learned Judge drew upon the particular facts of that case and the scope of the decision should be restricted to that case. The observations contained therein should not be understood as laying a different principle. The learned Judge has distinguished the decision of Satyanarayana Rao, J., in *Nanjappa Goundar* v. *Ramaswami Goundar*[5], on the ground that in the latter case the facts indicated a notional division of the right to take water from the well in accordance with the division of the properties. Stopping there, that ground of distinction directly applies to the instant case, because the lands were divided equally and the right to take water was also divided equally (Note : The division in the instant case was not for the plaintiff to take water for three days and the defendants to take water for four days, but each in his turn to take water only for three days). With great respect to Ananthanarayanan, J., I am unable to subscribe to his statement that

1. (1896) I.L.R. 19 Mad. 38.
2. (1945) 1 M.L.J. 347.
3. (1968) 1 M.L.J. 397.
4. I.L.R. (1963) Mad. 86 : A.I.R. 1962 Mad. 498.
5. (1951) 2 M.L.J. 343.

Venkatarama Sastri v. *Venkatanarasayya*[1], has not even remotest reference to the question The learned Judge (Ananthanarayanan, J.,) was of the view that the decision in *Venkatarama Sastri* v. *Venkatanarasayya*[1], rested on the ground that water in that case was hardly sufficient even for the actual extent of the ayacut and that any extension of it would cause great prejudice to the other ayacutadars. With greatest respect to learned Judge, that is not what the Bench decided. As I have observed already the Bench clearly held that irrespective of the question of damage, the plaintiff would be entitled to an injunction on the simple ground that the latter has no right to use water for irrigating other lands and that the right to take water from the well is inseparably connected with the lands. It is necessary to extract the following observations from the Bench judgment to focus the ground of decision in that case.

> " In this case, there is a finding that owing to the unauthorised use of the water by the defendants, the plaintiffs have suffered damage. *In our opinion, the plaintiffs would be entitled to an injunction even if no damage was proved.* The principle is that applied in *Kanakayya* v. *Narasimhulu*[2]. In the case of a party wall it was held that one of two co-tenants was entitled to the removal of a portion newly erected by the other co-tenant, although the former had suffered no inconvenience from it. Parker, J., observed :
>
> It is true that the refusal of plaintiffs to give the required permission may be ill-natured and that the raising of the wall will not really harm them.' Notwithstanding, they were held entitled to the relief, the principle laid down in *Watson* v. *Gray*[3], was applied. We think, the same rule applies by analogy to the case of joint tenants of a tank."

I am unable to follow the several observations contained in *Ramachandra* v. *Venkatachala*[4], as they are opposed to the Bench decision of this Court. I see considerable substance in the contention of the learned Counsel for the respondent that the general principles referred to in *Ramachandra* v. *Venkatachala*[4], with regard to the common enjoyment of common property by co-owners, *i.e.*, as between co-owners each is entitled to use common property in the best manner possible without determent to the enjoyment of the owner and that so long as the property does not suffer any injury or result in any loss, the co-owner cannot make any compaint, will not apply to cases like these where the co-ownership is not only in respect of lands but in respect of wells which are inseparably connected with the lands. With great respect, cases dealing with rights to common passage and extension of balcony over common land, are not of much relevance to the instant case. Learned Counsel for the appellant drew my atttention to the decision in *Kayambu Servai* v. *Karuppiah Servai*[5] as supporting his contention that the plaintiff must allege and prove diminution in, the supply of water. That decision has no relevance to the instant case. It related to the right of irrigation in two villages to take water from a particular tank and the argument that when the defendant attempted to irrigate his lands in some other village the plaintiff will be entitled to an injunction. The Court held that so long as the plaintiff's right to accustomed supply of water has not been interfered with, the plaintiff cannot have a grievance against the defendants. That case dealt with a case of a public source of irrigation and the argument there was that this right of the plaintiff to take water from the public source of irrigation like a government channel or a government tank was nonetheless a proprietary right and that by itself would entitle the plaintiff to an injunction when the defendant attempted to take water for irrigating some other lands. Following the well-setled rule of law laid down in *Nynappa Servai* v. *Veeran*[6], and *Basavana Gowd* v. *Narayana Reddi*[7], this Court held that in the case of public channels or tank no individual ayacutdar has a right to complain unless, there is a material diminution in the accustomed supply of water. The

1. A.I.R. 1929 Mad. 25.
2. (1896) I.L.R. 19 Mad. 38.
3. (1838) L.R. 14 Ch.D. 192.
4. I.L.R. (1963) Mad. 86 ; A.I.R. 1962 Mad. 498.
5. (1949) 1 M.L.J. 297.
6. (1909) I.L.R. 32 Mad. 423.
7. (1931) I.L.R. 54 Mad. 793 : 61 M.L.J. 563.

principle of that decision will not apply to a case of co-owners of lands with joint rights in a well.

Even on the question of damage I am against the defendants having regard to the fact that the plaintiff made a specific complaint that on account of the wrongful conduct of the defendant, there was a diminution in the supply of water to the plaintiff and the defendants did not traverse that position in his reply notice but they only contended that there was a panchayat and that at that panchayat, the parties were allowed to irrigate lands newly acquired by them. It is unnecessary to deal with the aspect further because I am of the view that independently of any question of damage, the plaintiff will be entitled to an injunction restraining the defendants from taking water for irrigating other lands. It is necessary to observe that this limit or fetter on the defendant with regard to the use of the water from the well equally applies to the plaintiff who too cannot take water for irrigating the lands newly acquired by him.

For all these reasons, the second appeal fails and is dismissed. In the circumstances of the case, I direct the parties to bear their own costs in the second appeal.

No leave.

S.V.J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Soliappa Mudaliar and another .. *Appellants**

v.

Meenakshi Ammal and others .. *Respondents.*

Hindu Succession Act (XXX of 1956), *sections* 14 *and* 15—*Applicability of—Women's Estate—Effect of Hindu Succession Act on women's estate—Widow becomes absolute owner of her husband's share—Death of widow, after Succession Act, without claiming partition—Succession governed by section* 15 *of the Act—Survivorship inapplicable—For section* 14, *mere right to take husband's share enough.*

Hindu Women's Rights to Property Act (XVIII of 1937)—*Women's estate—Widow claiming partition—Effect of—Death of widow—Devolution upon her husband's heirs.*

It is now well settled that for section 14 to apply, it is not necessary for a Hindu female either to make a demand upon the other members of the family for partition or to follow up that demand by partition and separate possession of her husband's share. The Hindu Women's Rights to Property Act of 1937 had invested the widow of a member of a coparcenary with the interest which the member had at the time of his death and this interest of the widow arises not by inheritance nor by survivorship, but by statutory substitution. She is introduced into the coparcenery and between the surviving coparceners of her husband and the widow there arises community of interest and unity of possession. On that account, the widow does not become a coparcener and because of the statutory substitution of her interest in the coparcenery property in the place of her husband, the right which the other coparceners have under Hindu law of taking her husband's interest by the rule of survivorship, remains suspended as long as that estate enures. It is open to the widow not to demand partition or she can by demanding partition make her interest definite. If she does not seek partition, her interest will merge into the coparcenery property on her death. But if she claims partition she is severed from the other members, her interest becomes definite interest in the coparcenery property and the right of the other members of the coparcenery to take the interest by survivorship becomes extinguished. The result is that when the widow dies after having severed her interest by making a demand for partition, the interest in the coparcenery property pertaining to the husband's share which become vested in her will devolve upon the heirs of her husband.

* S. A. No. 196 of 1961. 9th December, 1969.

The moment the Hindu Succession Act came into force, the widow became the absolute owner of her husband's share whether or not she had already made a demand for partition upon the other coparceners. For section 14 to come into operation, it is enough if she had a mere right to take the husband's share. The right conferred upon her under the statute of 1937 is by its own force sufficient to make her the absolute owner, she need not even have made a demand for partition nor was it necessary for her to follow the demand for partition by securing separate possession of her husband's share. Mere ownership of her husband's share is regarded as "property possessed by the widow" at the time of the commencement of the Succession Act. Physical possession of her husband's share is not necessary. Her right to obtain possession is sufficient within the meaning of section 14. It is implicit in section 14, that after the Hindu Succession Act came into force the widow becomes a fresh stock of descent and inheritance will have to be traced to her and only to her. This Act applies notwithstanding any other rule or interpretation of the Hindu Law in view of the overriding effect of the Act as specified in section 4. In the face of sections 15 and 16, no claim for survivorship could be advanced under the Hindu law especially when section 4 emphasises the overriding effect of the provisions of the Act. The idea of survivorship cannot be fitted into the scheme of the Act.

Language of section 14 is very wide and general. It applies to any property possessed by a Hindu female and contains no limitation about the character of the property or the manner in which the Hindu female acquired the property. In the case of survivorship the law applicable is ordinary Hindu law, but after the Hindu Succession Act, the law of Succession to the female's property is to be found in section 15 of the Succession Act which rules out any theory of survivorship.

M. R. Narayanaswami, for Appellants.

O. Radhakrishnan, for Respondent.

The Court delivered the following

JUDGMENT :—Defendants 3 and 4 are the appellants in this second appeal. The brief facts of the case are as follows. One Pongali and Nanjappa were mebmers of a joint family. Pongali died on 14th September, 1950, leaving behind him his widow Pachai Ammal, son Ramaswami and four daughters,—the plaintiffs in the present action. Pachayammal died on 19th December, 1956 and Ramaswami died in 1959. The first defendant is Ramaswami's widow and the second defendant is her daughter. On 11th December, 1950, Nanjappa and Ramaswami effected a partition of the joint family properties at which for Ramaswami's share about 9 acres were allotted, which included the suit properties of an extent of 7 acres 70 cent. It will be noticed that at that time the Hindu Women's Rights to Property Act of 1937 was in force and Panchayammal would be entitled to a half share in the right of her husband under section 3 (2) of the said Act. But at that partition no provision was made for her and the entire half share belonging to Pongali's branch was allotted to Ramaswami. After Ramaswami's death on October, 1959, his widow and daughter (defendants 1 and 2) sold the suit properties in April, 1962 to defendants 3 and 4 for Rs. 7,900. In May, 1963, the daughters of Pongali filed the suit for partition claiming 4/10th share in the suit properties. Their contention is that on Pongali's death, his widow Pachayammal became entitled to a half share, that under section 14 of the Hindu Succession Act of 1956 she became an absolute owner, and on her death on 19th December, 1956 that share devolved upon her son Ramaswami and her daughters, plaintiffs 1 to 4 in the suits. In other words, the plaintiffs filed the suit to work out their rights as the heirs of Pachayammal under the Hindu Succession Act in respect of her husband's share which devolved upon Pachayammal and became absolute after the Hindu Succession Act came into force. The suit was resisted by the defendants on the ground that at the time of the partition in the year 1950, Pachayammal waived her right to a share and was content and agreed to take maintenance from her son Ramaswami in view of the fact that the income from the properties was very negligible. The further contention of the

defendants was that as Pachayammal had not worked out her rights by demanding her share, on her death, the entire properties passed on to Ramaswami by survivorship and there was nothing to which the plaintiffs could make a claim as the heirs of Pachayammal.

The trial Court accepted the case of the defendants that at the time of the partition in 1950 Pachayammal had agreed not to take any share in the properties, but was content to receive maintenance from her son. The trial Court also upheld the defendants' plea that as Pachayammal did not work out her right by demanding a partition, the entire properties passed on to Ramaswami, the son, by survivorship and that the plaintiffs had no right whatsoever. But, on appeal, the lower appellate Court came to a contrary conclusion on both the points. Hence the appeal by defendants 3 and 4.

The conclusion arrived at by the lower appellate Court that Pachayammal did not agree to receive maintenance waiving her right to a share is correct and supported by adequate and satisfactory evidence. I see no ground for interference in second appeal.

The main point to mention is that prior to the suit a notice was issued on behalf of the plaintiffs demanding partition to which the defendants sent a reply. (Exhibits A-4 and A-5 are the notice and the reply). In that reply no reference whatsoever was made to the mother agreeing to take maintenance giving up her right to a share in the property. On the other hand, a totally inconsistent and extreme case was put forward that the mother was not entitled to any right in the properties at all and that they belonged to Nanjappa and Ramaswami. It is obvious that if there was such an agreement in pursuance of which the mother agreed to take maintenance and gave up her right to a share in the properties, that would have been metntioned in the forefront in the reply notice. Even in the written statement which was filed in the first instance, there was no such plea. It was only in the supplemental written statement filed that this point was raised in a vague form. This itself shows that it is an after-thought. Further, if there was such an arrangement, the best witness, is the first defendant. She has not been examined and the necessary adverse inference has to be drawn. It is unnecessary to elaborate the point further because I am satisfied that the finding arrived at by the lower appellate Court is correct and does not call for interference in second appeal.

It only remains to deal with the point of law whether the husband's share in the joint family properties to which Pachayammal became entitled under the Hindu Women's Rights to Property Act of 1937 survived to her son Ramaswami since Pachayammal did not work out her right by claiming partition. There is absolutely no substance in this contention and in my view the matter is simply unarguable. A series of recent decisions of the Supreme Court had to deal with the scope of section 14 of the Hindu Succession Act and it is now well settled that for section 14 to apply, it is not necessary for a Hindu female either to make a demand upon the other members of the family for partition or to follow up that demand by partition and separate possession of her husband's share. The Hindu Women's Right to Property Act of 1937 had invested the widow of a member of a coparcenery with the interest which the member had at the time of his death and this interest of the widow arises not by inheritance nor by survivorship, but by statutory substitution. She is introduced into the coparcenery and between the surviving coparceners of her husband and the widow there arises community of interest and unity of possession. On that account, the widow does not become a coparcener and because of this statutory substitution of her interest in the coparcenery property in the place of her husband, the right which the other coparceners have under Hindu Law of taking her husband's interest by the rule of survivorship, remains suspended so long as that estate enures. It is open to the widow not to demand partition or she can be demanding partition make her interest definite. If she does not seek partition, her interest will merge into the coparcenary property on her death. But if she claims partition she is severed from the other members, her interst becomes definite interest in the coparcenery property

and the right of the other members of the coparcenery to take the interest by survivorship becomes extinguished. The result is that when the widow dies after having severed her interest by making a demand for partition, the interest in the coparcenery property pertaining to the husband's share which became vested in her, will devolve upon the heirs of her husband. It is sufficient to refer to the latest decision of the Supreme Court in *Satrughan* v. *Sabujpari*[1]. Before this decision, there was divergence of judicial opinion. Some Courts took the view that the property obtained by a widow of a deceased coparcener even after a suit for partition would on the death of the widow revert to the coparcener and would not devolve upon the heirs of the husband on the reasoning that the demand for partition does not make the share of the deceased husband his separate property so as to let in his heirs after the widow's death. The other view was that there will be no reverter to the other coparceners if the widow had divided herself from the other members of the coparcenery after making a demand for partition and that on her death, the succession would be traced to her husband on the basis that the property was his separate property. In the decision cited above, the Supreme Court after referring to the divergence of judicial opinion approved the following statement of the law of Subba Rao, J., as he then was, in the Full Bench decision in *Parappagari Parappa* v. *Parappagari Nagamma*[2]:

> " The following observation made by Subba Rao, J., in delivering the judgment of the Full Bench in *Parappagari Parappa* v. *Parappagari Nagamma*[2], in our judgment correctly set out the effect of the Act on the question under review :
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> ' She could ask for partition and separate possession of her husband's share. In case she asked for partition, her husband's interest should be worked out having regard to the circumstances obtaining in the family on the date of partition. If she divided herself from the other members of the family during her life time, on her demise the succession would be traced to her husband on the basis that the property was his separate property. If there was no severance, it would devolve by survivorship to the other members of the joint Hindu family'."

The dispute in the csae before the Supreme Court arose before the Hindu Succession Act of 1956 came into operation. One Babuji died in 1934 and on his death in October, 1937, his widow Chando Kuer filed a suit for partition and separate possession of her husband's share, her case being that her husband got separated and divided even during his life time but that plea of partition was found against. Even so, the widow would be entitled to her husband's share under the Hindu Women's Right to Property Act of 1937. During the pendency of the suit, the widow died in 1951 and the suit was prosecuted by her daughters. The surviving coparceners resisted the suit and conteded that the suit came to an end the moment the widow died and that the right of survivorship which was suspended during the life time of the widow became revived on her death and reverted back to the surviving coparceners. The Supreme Court negatived the claim of the surviving coparceners and approved the view expressed by Subba Rao, J., as he then was, in *Parappagari Parappa* v. *Parappagari Nagamma*[2]. Learned Counsel for the appellant relied upon this decision of the Supreme Court as supporting his contention that as the widow Pachayammal died without a demand for partition, her share had reverted to the son. I am unable to accept this contention as in the instant case, the widow died after the Hindu Succession Act of 1956 came into force. As observed already, the moment the Hindu Succession Act came into force, the widow became the absolute owner of her husband's share whether or not she had already made a demand for partition upon the other coparceners. For section 14 to come into operation, it is enough if she had a mere right to take the husband's share. The right conferred upon her under the statute of 1937 is by its own force sufficient to make her the absolute owner; she need not even have made a demand for partition nor was it necessary for her to follow the demand for partition by securing separate possession of her husband's share. The

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1. (1967) 1 S.C.R. 7 : (1967) 2 S.C.J. 712 : A.I.R. 1967 S.C. 272.
2. (1954) 1 M.L.J. 250 : I.L.R. (1954) Mad. 183 : A.I.R. 1954 Mad. 576 (F.B.).

recent decisions of the Supreme Court have held that her mere ownership of the husband's share by reason of the statute without anything more is sufficient to attract section 14 of the Hindu Succession Act. That ownership of the share is regarded as "property possessed by the widow" at the time of the commencement of the Succession Act. Physical possession of the husband's share is not necessary. Her right to obtain possession is sufficient within the meaning of section 14. In *Mangal Singh* v. *Rattno*[1], the Supreme Court has observed as follows at page 1790 :

> "It appears to us that the expression used in section 14 (1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would, of course, cover the other cases of actual or constructive possession. On the language of section 14 (1), therefore, we hold that this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property."

It is implicit in section 14 that after the Hindu Succession Act came into force the widow becomes a fresh stock of descent and inheritance will have to be traced to her and only to her. This Act applies notwithstanding any other rule or interpretation of the Hindu Law in view of the overriding effect of the Act as specified in section 4. Section 15 contains a special provision which lays down the rules of succession to property belonging to a female Hindu and that contains specific provision enumerating the heirs and the mode of devolution in the case of property inherited from the parent's side and in the case of property inherited from the husband's side. Section 16 is the supplementary provision as to how the distribution should take place. In the face of these specific provisions, I am not able to conceive how any claim for survivorship could be advanced under the Hindu Law especially when section 4 emphasises the overriding effect of the provisions of the Hindu Succession Act. The idea of survivorship cannot be fitted into the scheme of the Act. For instance section 19 provides that when 2 or more heirs succeed they take only as tenants in common and not as joint tenants. Section 6 of the Act provides for succession of the interest of coparcener when he dies as a member of a coparcener.

Language of section 14 is very wide and general. It applies to any property possessed by a Hindu female and contains no limitation about the character of the property or the manner in which the Hindu female acquired the property. The only question is that when Pachayammal died in December 1956 did she not die leaving behind property answering the description of "property of a Hindu female dying intestate within the meaning of section 15". The matter does not admit of any argument contra. The argument that Pachayammal had only the same interest as that of her husband that even though the husband was the absolute owner on his death, the property survived to the coparceners and that the same consequences should ensue even when the widow died after Succession Act came into force has no substance as it fails to take note of the impact of the provisions of the Succession Act. In the case of survivorship arising on the death of a coparcener, the law applicable is ordinary Hindu law, but after the Hindu Succession Act, the law of succession to the female's property is to be found in section 15 of the Succession Act which rules out any theory of survivorship.

At this stage, I may refer to the decision of the Supreme Court in *Sukh Ram* v. *Gauri Shankar*[2]. That decision dealt with property acquired by a widow of a Hindu joint family governed by the Benares School of Hindu Law under which a Hindu can alienate his interest in the joint family property subject to certain restrictions. The argument was that in the case of a widow of such a Hindu governed by the Benares School of Hindu Law, she will not become an absolute and full owner under section 14 of the Act. This argument was not accepted and the Supreme Court held that the interest to which the widow became entitled to on the death of her

1. (1968) 1 S.C.J. 487: (1967) 3 S.C.R. 454: A.I.R. 1967 S.C. 1786.
2. (1968) 2 S.C.R. 476 : (1968) 2 S.C.J. 122: A.I.R. 1968 S.C. 365.

husband under the Hindu Women's Rights to Property Act, 1937, was indisputably her property within the meaning of section 14 of the Hindu Succession Act of 1956 and when she became full owner of that property, she acquired a right unlimited in point of user and duration and uninhibited in point of disposition.

My attention was also drawn to a recent decision of Natesan, J., in S.A.No. 796 of 1965. There an identical argument was advanced that if the widow (though after the Hindu Succession Act came into force) died without demanding a partition from the coparceners, the property would pass by survivorship to the coparceners and the heirs of the widow would not be entitled to the same. The learned Judge rejected this argument and held that the interest of the female Hindu became absolute under section 14 of the Hindu succession Act for all purposes, that inheritance would have to be traced only to her and that there was no right of survivorship. This decision contains a discussion of the scope of the Supreme Court judgments in *Satrughan* v. *Sabujpari*[1], as well as in *Sukh Ram* v. *Gauri Shankar*[2]. With respect, this decision lays down correct law.

For all these reasons, I have no hesitation in holding that the plaintiffs are entitled to 4/10th share in the suit properties. The Second Appeal fails and is dismissed. No costs. No leave.

S.V.J. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P. S. KAILASAM.

Sri Bandari, Deputy General Manager, Establishment Department, Administrative Office of the Canara Bank Ltd., Bangalore-2 .. *Petitioner**

v.

The State of Madras represented by the Assistant Inspector of Labour, Erode II .. *Respondent.*

Madras Shops and Establishments Act (XXXVI of 1947), sections 25 (2), 50 and 51—Scope—Banking establishment—Leave benefits—Desai Award in conflict with provisions of Act—Workers neither electing to be bound by provisions of Act nor decision in this regard given under section 51 after due enquiry—Management applying Desai Award— Cannot be prosecuted for contravention of section 25.

The contention that as the Desai Award is in conflict with the Madras Shops and Establishments Act so far as leave benefits are concerned, section 50 of the Act should be interpreted so as to mean that the Act should prevail, is untenable. Section 50 itself confers on the worker a power of election between the two sets of benefits. Unless it is shown in a given case that the worker has exercised this option and elected to be bound by the provisions of the Act or a question as to the applicability of the provisions of the Act has been raised for the decision of the Labour Commissioner and he has decided the question under section 51 after a due enquiry a prosecution cannot be launched against the management on the allegation that they, by applying the Desai Award, failed to comply with the terms of the Act in regard to the grant of leave benefits to a worker.

In the present case, the facts show that the Desai Award is in many respects more advantageous to the worker than the Madras Shops and Establishments Act from the point of view of leave benefits. The worker concerned has also enjoyed privilege leave in accordance with the terms of the Desai Award. In the above circumstances the prosecution cannot urge that there has been a non-compliance

1. (1967) 1 S.C.R. 7 : (1967) 2 S.C.J. 712 : A.I.R. 1967 S.C. 272.
2. (1968) 1 S.C.R. 476 : (1968) 2 S.C.J. 122: A.I.R. 1968 S.C. 365.

* Crl. R. C. No. 898 of 1967 ; Crl. R.P. No. 885 of 1967. — 8th April, 1969.

with the provisions of the Act, in the matter of grant of sickness leave pay to the worker concerned merely because the management had granted the sickness leave pay in accordance with the terms of the Desai Award.

No doubt, section 51 of the Madras Shops and Establishments Act or the rules do not prescribe any particular procedure for an enquiry under that section. But nevertheless being an enquiry under the statute certain minimum formalities have to be followed. All the interested parties have to be given an opportunity to make their representations, so as to comply with the requirements of natural justice.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate, Erode, dated 31st May, 1967 and made in S.T.R. No. 11 of 1967.

M. R. Narayanaswami, for Petitioner.

Calvin Jacob, for Public Prosecutor, for State.

The Order of the Court was made by

Ramakrishnan, J.—This criminal revision case raises for decision an interesting question about the scope of sections 50 and 51 of the Madras Shops and Establishments Act 1947 (hereinafter called the Act), in the context of what its well known as the Desai Tribunal Award made in the industrial dispute between certain banking companies and their workmen. The Desai Award modified an earlier award known as the Sastri Award. Thiru K.N. Mudaliar J., before whom the criminal revision case came for disposal, considered that this case involved "a complicated question of law, which has the character of substantial public importance". That is how the criminal revision case has come before a Bench for disposal.

The facts relating to the case are briefly as follows: On the complaint of the Assistant Inspector of Labour, Erode, Sri Bandari, Deputy General Manager, Establishment Department, Administrative Office of the Canara Bank Limited, Bangalore, was prosecuted before the S.D.M. Erode, and convicted under section 45 (1) read with section 25 (2) of the Act, and sentenced to pay a fine of Rs. 20, in default to undergo simple imprisonment for 2 days. The complainant alleged that one Sri Moolanathan, an employee of the bank at Erode was on sick leave for two days; the management paid him only half his wages for the two days in question. It was the contention of the complainant that under section 25 (2) of the Act the employee was entitled to sick leave with full wages for a period not exceeding 12 days during one year of service. When the authorities of the Labour Department directed the bank to pay full wages to the abovesaid employee, they refused to comply. This non-compliance was treated as a contravention attracting the penalty under section 45 of the Act.

The bank before the lower Court, relied on the provisions of the Desai Award, which granted to the employees of banks the benefit of sick leave upto 30 days during one year of service, but only on half wages per day. In the view of the bank this provision for the sick leave in the Desai Award should be taken along with other leave benefits, which that award has granted to banking employees and if so taken, the benefits under the Award are more advantageous from the point of view of the employees, than similar benefits which the Act had granted to the employees before the Desai Award. The bank contended that under section 50 of the Act the workers are entitled to elect the more favourable of the terms as to leave as between the Desai Award and the Act. As against this contention, the complainant in the lower Court referred to a communication from the Commissioner of Labour to the bank on 2nd March, 1966, stating that for the purpose of casual and sick leave the Act should apply and not the Desai Award. It was urged that under section 51 of the Act the decision of the Commissioner thus communicated will be binding on the employer.

We will now set out sections 50 and 51 of the Act, which are in the following terms:

"50. Nothing contained in this Act shall affect any rights or privileges which any person employed in any establishment is entitled to, on the date on which this Act comes into operation in respect of such establishment, under any other law, contract, custom or usage applicable to such establishment, if such rights or privileges are more favourable to him than those to which he would be entitled under this Act."

"51. If any question arises whether all or any of the provisions of this Act apply to an establishment or to a person employed therein or whether section 50 applies to any case or not, it shall be decided by the Commissioner of Labour and his decision thereon shall be final and shall not be liable to be questioned in any Court of law".

The privileges under the Desai Award in respect of leave are briefly the following :—(1) One month's privilege leave on full pay for 11 months of service; and the leave can be accumulated up to three months ; (2). Casual leave with full pay for 12 days in a year ; (3). Sick leave with half pay for 30 days in a year. The corresponding privileges under the Act are the following : (1). Privilege leave for 12 days for 12 months' service which can be accumulated up to a maximum of 24 days ;(2). 12 days casual leave with full pay ; (3). 12 days sick leave with full pay in a year.

The Desai Award while conferring the above privileges ; in paragraph 9 (33) under Chapter IX, Leave Rules, stated thus ;

"I make an award in connection with leave rules in terms of the Sastry Award as modified by the Labour Appellate Tribunal's decision set out earlier, with the alterations, modifications and additions made by me as set out above. *Wherever the provisions of any law applicable to any place are in conflict with the provisions herein contained, the provisions of law should be applied*".

Prima facie, the leave privileges under the Act are different from those granted under the Desai Award. The learned Public Prosecutor for the State opposing the revision filed by the accused contends that because of the conflict between the leave privileges granted under the Act and the corresponding privilege allowed under the Award, the terms of the Act should prevail, and therefore the bank was obliged to give 12 days sick leave with full pay to its employees. For this purpose he refers to the terms contained in the underlined portion* in para. 9 (33) of the Desai Award which we have extracted above. But this argument overlooks the important point that the Act itself does not say that it should be applied absolutely. Section 50, which we have extracted above lays down a fetter or limitation, in the application of the Act itself in the matter of rights and privileges of employees. It grants to the employees a power of election to choose the better and more favourable as between the privileges conferred under the Act and those under any other law, contract, custom or usage applicable to the establishment. The Act was in force from 1948. The benefits under the Desai Award became enforceable from 30th July, 1962. Since this is a question of benefits to the workmen, it is they who have to make the election in terms of section 50. They could do so, either by themselves or through a representative union. The Supreme Court in *Tata Oil Mills Company* v. *Gopalan*[1], dealing with a similar power of election conferred under section 11 of the Kerala Industrial Establishments (National and Festival Holidays) Act, 1958, observes as follows at page 127 :

"This section gives an option to the employees ; they can choose to have the paid holidays either as prescribed by section 3 or as are available to them under any other law, contract, custom or usage".

The further contention of the management in this case is that Sri Moolanathan had already enjoyed during the year in question 32 days privilege leave. In other words, he had elected the leave terms under the Desai Award which alone grants one month's privilege leave for a year of service with the right to accumulate leave up

* Printed in Italics.

1. (1966) 1 S.C.J. 338 : (1965) 3 S.C.R. 760 : (1965) 2 L.L.J. 124.

to three months, while under the Act such leave is at 12 days for 12 months service, which can be accumulated only upto 24 days. That is the reason why the management held that he was bound to enjoy the sickness leave only in terms of Desai Award. They claimed, in our opinion, with justification, that the leave privileges should be viewed as a whole and not separately. Therefore, the sick leave cannot be dissociated from the other kinds of leave. The prosecution in the Court below relied upon certain correspondence between management and the Commissioner of Labour ending with letter dated 8th March, 1966 of the Commissioner of Labour to the manager of the Bank which reads thus :

> " (2) *Grant of sick leave on half pay* : According to section 25 (2) of the Madras Shops and Establishments Act 1947 casual leave and sick leave shall be granted to employees, with full pay. The Desai Award itself provides that if its directions are inconsistent with the statutory provisions of local Shops and Establishment Act, they must give place to the statutory provisions. You are therefore requested to comply with the provisions of the Madras Shops and Establishments Act, 1947."

It is clear from this correspondence that it does not touch on the general question to be decided under section 51 of the Act as to whether the terms of the Desai Award in regard to leave benefits as a whole, or the terms of the Act, are more advantageous. No doubt when a question is referred in a case of dispute, for the decision of the Commissioner of Labour under section 51 of the Act, the Act or the rules do not prescribe any particular procedure for the enquiry. But nevertheless being an enquiry under the statute certain minimum formalities have to be followed. All the interested parties have to be given an opportunity to make their representations so as to comply with the requirements of natural justice. While dealing with an analogous provision in Article 217(3) of the Constitution wherein the President of India has to decide the question, if it is raised as to the age of a Judge of a High Court, the Supreme Court in *Jyoti Prakash Mitter* v. *Chief Justice, Calcutta*[1], held thus :

> "It is also implicit in this provision that before the President reaches his decision on the question, he ought to give the Judge concerned a reasonable opportunity to give his version in support of the age stated by him at the time of his appointment and produce his evidence in that behalf. How this should be done, is, of course, for the President to decide, but the requirement of natural justice that the Judge must have a reasonable opportunity to put before the President his contention, his version and his evidence, is obviously implicit in the provision itself".

It is not contended that in the present case the Commissioner of Labour held any formal enquiry for deciding the question under section 51 and gave an opportunity to all the interested parties to make their representations. The learned Public Prosecutor also fairly concedes that such an enquiry was not held and a decision given by the Commissioner of Labour on the question of leave benefits as a whole, as between the Desai Award and the Act.

On the other hand, as already mentioned, the learned Public Prosecutor relies on a very narrow ground that as the Desai Award is in conflict with the Act so far as leave benefit are concerned, section 50 of the Act should be interpreted so as to mean that the Act should prevail. But we have already held that section 50 itself confers on the worker a power of election between two sets of benefits. Unless it is shown in a given case that the worker has exercised this option, and elected one or the other of the benefits, whether under the Act or the Desai Award, or a question has been raised for the decision of the Labour Commissioner and he has decided the question one way or the other, a prosecution cannot be launched against the management on the allegation, that they have failed to comply with the terms of the Act in regard to the grant of leave benefits to a worker. In the present case, the facts show that the Desai Award is in many respects more advantageous to the worker than the Act, from the point of view of leave benefits. This will be apparent if a compari-

1. (1965) 2 S.C.R. 53: A.I.R. 1965 S.C. 961 at p. 966.

son is made between the terms of the Desai Award and the terms of the Act, which we have extracted above. The worker, Sri Moolanathan has also enjoyed the privilege leave in accordance with terms of the Desai Award. In the above circumstances the prosecution cannot urge that there has been a non-compliance with the provisions of the Act, in the matter of grant of sickness leave pay to the worker concerned. For the above said reasons we allow the revision case and quash the conviction of the petitioner. The fine amount, if paid, will be ordered to be refunded.

V.K. ——— *Revision case allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

M. Krishnan .. *Petitioner**

v.

Pankaj Jethlal Shah .. *Respondent.*

Motor Vehicles Act (IV of 1939), section 110-C (2)—Claims tribunal—Whether has power to appoint commission to record evidence—When can be exercised.

Sub-section (2) of section 110-C of the Motor Vehicles Act is sufficiently wide to include the power to appoint a commission for recording evidence of a witness. The substance of this power is that the claims tribunal will have all the powers related to taking of evidence on oath and of enforcing attendance of witnesses, including the power to have evidence recorded on commission.

But the power so entrusted to the tribunal should be exercised in accordance with the principles settled by Courts in the light of the related provisions in the Civil Procedure Code.

Petition under Article 227 of the Constitution of India praying the High Court to revise the order of the Motor Accidents Claims Tribunal, North Arcot, Vellore, in I.A. No. 35 of 1968 in M.A.C.T.O.P.No. 11 of 1967 dated 12th March, 1968.

N. R. Raghavachari, for Petitioner.

R. Shanmugham, for Respondent.

The Court made the following

ORDER.—The only point in this petition is whether the Motor Accidents Claims Tribunal possess the power to appoint a commission for recording evidence of a witness in Bombay. The Tribunal held that it had the power in view of section 110-C (2) of the Motor Vehicles Act. In my view, the Tribunal was right. No doubt, rule 18 of the Madras Motor Accidents Claims Tribunal Rules 1961 does not mention Order 26 of the Civil Procedure Code. Even so, sub-section (2) of section 110-C is sufficiently wide to include the power. It speaks of the power of a civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses. The substance of this power is that, for the purpose of disposing of a claim before it, the Tribunal will have all the powers related to taking of evidence on oath and of enforcing attendance of witnesses, including the power to have evidence recorded on commission.

But the power so entrusted to the Tribunal should be exercised in accordance with the principles settled by Courts in the light of the related provisions in the Civil Procedure Code. It is only in very extraordinary circumstances that a party to a litigation will be allowed to be examined on commission, as for instance, sickness disabling the movement of the party from attending Court or Tribunal to give evidence. Mr. Raghavachariar says the Tribunal has not applied its mind to this aspect in including within the scope of the commission examination of the claimant at Bombay. While the view of the Tribunal that it has power to appoint a commission to record evidence is confirmed, it is directed to consider whether, in the light of what

* C.R.P. No. 548 of 1968. 25th October, 1968.

has been stated *supra*, the Tribunal would still think that the claimant can be examined on commission. Subject to this observation, the Civil Revision Petition is dismissed but with no costs.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

P.S. Shanmugham .. *Appellant**

v.

The Deputy Commissioner of Police, Law and Order, Madras, and others .. *Respondents.*

Madras City Police Act (III of 1888), section 35—Licence to run a lodging house—Grant or refusal of—Essential considerations.

Fundamental right is a guarantee made by the Constitution and has to be protected both by the officers as well as by the Court. It is not to be overlooked that wherever power is granted to an officer for exercise in favour of a citizen by a statute, it is generally meant for exercise and its exercise can be denied neither arbitrarily nor for reasons not relevant to such refusal. Also it is always a matter for consideration before refusal whether the situation cannot be met by regulation or restriction instead of totally denying a right guaranteed by the Constitution.

Merely because a traffic problem is expected, that by itself, would not be a ground for declining a licence to run a lodging house under section 35 of the Madras City Police Act. The authority would have to see whether the traffic would be impossible of regulation for reasons to be stated. Where a fundamental right, right to carry on one's trade as in the instant case, is involved, before its exercise is in effect prohibited, all the avenues for granting a licence will have to be explored and it is only when all these avenues are blocked, can the exercise of a fundamental right be prevented by denial of the licence.

Appeal under clause 15, Letters Patent, against the order of Kailasam, J., in W.P.No. 2261 of 1968.

K.K. Venugopal and *S. Ramalingam*, for Appellant.

The Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal arises from an order declining to interfere with the refusal by the Deputy Commissioner of Police to grant a licence to the appellant under section 35 of the Madras City Police Act, 1888 to run a lodging house at premises No. 5, Narasingapuram, Mount Road, Madras. The appellant is a lessee of the building at a rental of Rs. 2,000 per mensem and says that he has spent Rs. 15,000, for equipment of the lodging house. Due sanction would appear to have been obtained in October, 1964 from the City Corporation under the provisions of the City Municipal Act for constructing the building designed to be used as a lodging house. By a notice dated 11th January, 1968, the Assistant Commissioner of Police, with reference to the appellant's application for a licence under section 35, asked him to show cause why it should not be rejected, and the reasons given by the officer were : (1) the street is only about 20 ft. in width and is narrow ; (2) it is one way traffic and very near to the junction of the main road, (3) the neighbours objected for the issue of a licence. The appellant explained to him that, because it is one way traffic, there would be no hindrance to the traffic and that so far as the objection from the neighbours was concerned, it had been already dealt with and decided against them by the Civil Court. The appellant also appended to his explanation a copy of the judgment in that regard. He also invited the officer's attention to the

* W.A. No. 290 of 1968. 13th February, 1969.

fact that he had spent a large sum of money in getting the lease and equiping the building with furniture and other equipments. The Deputy Commissioner by his order dated 15th February, 1968, dismissed the application for licence. He mentioned in justification that there was always congestion in the street which affected traffic even on the main road and that the important point for providing space for car parking had been omitted. In his appeal to the Commissioner of Police the appellant drew his attention to the fact that there were a number of lodges situated in narrow street in Madras for which licence had been granted by the Commissioner, though they were all without car parks, and stated further that they would not get any motor cars to the lodge, and, if it happened they would make some other arrangements. But the Commissioner dismissed the appeal and said :

> " I have gone into this matter in detail and I find that there is no case for revising the order already passed. The Joint Director of Town Planning, who was also consulted, has remarked that the street is already declared as one way and that there is no space provided for car parking and street parking also cannot be tolerated as it is a narrow street. It is also observed that apart from the lodge the premises also is developing into a shopping area which is not a desirable trend in this locality. Further, the area is already a congested one and lodging meant for middle class people will surely attract cars and ultimately result in blocking of street by parking cars and create a traffic problem ".

It was to quash this order the appellant had filed the petition, out of which this appeal arises.

The main point that was urged in the writ petition appears to be that section 35 of the Madras City Police Act, 1888, was void, as violating Article 14 of the Constitution, because it laid down no guidelines for exercising the wide and uncontrolled discretion vested by the section in the licensing authority and that, though the Act provided for rule making power no rules also had been made in order to regulate the exercise of discretion under section 35. Both these grounds did not find favour, resulting in the dismissal of the petition.

In our view, the order of the Commissioner shows that he did not keep in view the essential considerations that should govern granting or refusing a licence under section 35. The appellant has undoubtedly a fundamental right under Article 19 of the Constitution to ply his trade or business. It is true this is not an absolute right, but it can be regulated, restricted or in extreme cases even denied, if that is reasonably required in public interest. Fundamental right is a guarantee made by the Constitution and has to be protected both by the officers as well as by the Court from that standpoint. Further, it is not to be overlooked that wherever power is granted to an officer for exercise in favour of a citizen by a statute, it is generally meant for exercise and its exercise can be denied neither arbitrarily nor for reasons not relevant to such refusal. Also it is always a matter for consideration before refusal whether the situation cannot be met by regulation or restriction instead of totally denying a right guaranteed by the Constitution.

The crux of the Commissioner's order for declining the grant of licence is that it would create a traffic problem. This is upon the supposition that, because the area is congested and the lodging house might attract cars, it might " ultimately result in blocking of street by parking car ". But the point is that the fact that it is a one way traffic and so not likely to involve congestion of traffic and the appellant's statement that he would make other arrangements for parking of cars, if necessary, do not appear to have weighed with or considered by the Commissioner before declining a licence. Merely because a traffic problem is expected, that by itself, in our opinion, would not be a ground for declining the licence. Still the authority would have to see whether the traffic would be impossible of regulation for reasons to be stated. It may be that the area is already congested and is fast developing into a shopping area. But the Corporation has already permitted the building designed for a lodge to be put up. There is nothing to show that the health authorities have prohibited the building from being used as a lodging house and that, however, may

not be a matter related to traffic problem. There is nothing also in the order of the Commissioner to show how the traffic problem, which he anticipated, could arise, if the street was one way traffic and if restrictions could be placed upon allowing parking of cars in front of the lodging house.

In a matter like this, this Court will certainly not sit in judgment upon the Commissioner's order as a Court of appeal, but would only examine whether his order has failed to keep in view the considerations we have mentioned above and, therefore, it cannot be upheld. We are constrained to point out that where a fundamental right, as in this case, is involved, before its exercise is in effect prohibited, all the avenues for granting a licence will have to be explored and it is only when the Commissioner is satisfied that all these avenues are blocked can the exercise of a fundamental right be prevented by denial of the licence. The very licensing provision is designed for the purpose of regulation rather than for denying the exercise of the right and it is only where regulation is impossible, it can fairly be said that a balancing of the fundamental right against public interest necessarily results in a prohibition of the exercise of the fundamental right.

We allow the appeal. This does not mean that a licence will straightaway be granted to the appellant. The licensing authority will dispose of the appellant's application afresh after consideration of all the facts and also keeping in view the considerations we have mentioned in this judgment. No costs.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE M. M. ISMAIL.

Smt. S. R. Y. Bhavani Devi .. *Petitioner**

v.

Corporation of Madras and another .. *Respondents*

Madras City Municipal Corporation Act (IV of 1919), *section* 105—*Vacancy remission of property tax under—When can be claimed.*

Irrespective of any consideration of hardship or injustice, on the language of section 105 of the Madras City Municipal Corporation Act, 1919, and with reference to the definition of the term "building" occurring in section 3 (4) of the Act, it must be held that the owner of a building is entitled to a remission of the property tax only if the building remains wholly vacant or unlet and if any portion of the building is in occuption or let out, even though the portion so let out forms only a small part of the whole, the provisions of section 105 of the Act are not attracted and the owner of the building is not entitled to any remission.

Petition under Article 226 of the Constitution, praying the High Court to issue a writ of *certiorari* calling for records relating to R.D.C. No. 33485 of 1969 of the Assistant Revenue Officer, IV, Corporation of Madras, and quash the said order.

G. K. Damodar Rao and *S. R. Vittal*, for Petitioner.

T. Chengalvaroyan, for Respondents.

The Court made the following

ORDER.—The petitioner is the owner of premises No. 23, Nungambakkam High Road, Madras-34. The total area of the building with the adjacent vacant site all round is about 34 grounds, out of which the building portion alone occupies an area of about ten grounds. The entire main building of the total extent plinth area of about 16,000 square feet excepting a small area of about 1,000 square feet in the north-east corner of the main building was let out to the Madras Industrial Investment Corporation on a monthly rental of Rs. 1,400 from 1st February, 1963. The north-east corner of the building has been let out to M/s. Sarathi Films on a rental of Rs. 50 per month. But there is an out-house in the north-eastern extremity

*W.P. No. 2239 of 1966, 17th June, 1969.

of the compound and that out-house is in the occupation of a tenant by name Kohinur Confectionary, paying a monthly rent of Rs. 50. The Madras Industrial Investment Corporation vacated the premises under its occupation on 31st January, 1966 and as such the portion in its occupation has remained vacant from 1st February, 1966 until 31st August, 1966. During this period the petitioner was getting a rent of Rs. 100 only made up of Rs. 50 from Sarathi Films occupying a portion of the main building and Rs. 50 from Kohinur Confectionary occupying the out-house. It is under these circumstances the petitioner even on 20th January, 1966, before the major portion of the main building actually fell vacant, wrote to the Revenue Officer of the Corporation of Madras about the impending vacancy and the likelihood of the main building remaining vacant and prayed for waiving the property tax for the period of vacancy. She wrote another letter on 3rd March, 1966. Not having any reply even to this letter, she wrote a third letter on 9th May, 1966. Without sending any reply to any of these letters, the Assistant Revenue Officer by a notice dated 14th June, 1966 called upon her to pay the property tax of Rs. 2,520.94 within 15 days. On 20th August, 1966, an officer of the Corporation approached the petitioner with a distress warrant to distrain her goods, and chattels at the place of her residence in Gandhinagar and demanded from her payment of Rs. 5,181.78 together with warrant fees. The petitioner then sent a revision petition to the Commissioner of the Corporation and according to the petitioner she has not received any reply from the Commissioner. Four days after the distress warrant by communication R.D.C. No. 33485 of 1966 dated 24th August, 1966, the Assistant Revenue Officer of the Corporation informed the petitioner that her request for vacancy remission could not be granted as it is only a partial vacancy. It is to quash this communication of the Assistant Revenue Officer, the present writ petition has been filed.

Mr. G. K. Damodar Rao, the learned Counsel for the petitioner, in support of the writ petition, put forward two contentions. The first contention is that, while granting or refusing to give remission of the property tax, the authorities were acting in a quasi-judicial capacity and that no opportunity was given to the petitioner for pressing her case before any final decision was arrived at by them. The second contention is that even though the vacancy is a partial one, the petitioner is entitled to vacancy remission by virtue of section 105 of the Madras City Municipal Corporation Act, 1919.

I shall take up the second contention first. Section 105 (1) of the Act says:

> "When any building whether ordinarily let or occupied by the owner himself has been vacant and unlet for thirty or more consecutive days in any half year, the Commissioner shall remit so much, not exceeding one-half of such portion of the tax as relates to the building only as is proportionate to the number of days during which the building was vacant and unlet in the half-year."

It is necessary to refer to the definition of the term building as contained in section 3 (4) of the Act. That definition says that "building" includes—

> "(a) a house, out-house, stable, latrine, godown, shed, hut, wall (other than a boundary wall not exceeding 8 feet in height) and any other structure whether a masonry, bricks, mud, wood, metal or any other material whatever;
>
> (b) a structure on wheels or simply resting on the ground without foundations; and
>
> (c) a ship, vessel, boat, tent, van and any other structure used for human habitation or used for keeping or storing any article or goods."

It is an admitted fact that the portion occupied by M/s. Sarathi Films on a monthly rental of Rs. 50 constitutes portion of the main building, though only a small portion. In this context, the question arises, whether the petitioner is entitled to any vacancy remission under section 105 of the Act in relation to the major portion of the main building vacated by the Madras Industrial Investment Corporation and remaining vacant for the relevant period. As the language of the statute stands,

I am unable to accept the contention of the learned Counsel for the petitioner that, notwithstanding a small portion in the main building being in the occupation of a tenant, the petitioner is entitled to vacancy remission, because the major portion of the building remained vacant. The definition of the term "building" in the Act does not support any such contention. It is useful in this context to compare the definition of the term "building" occurring in the Madras Buildings (Lease and Rent Control) Act, 1960, and the definition of the term "building" in the Madras City Municipal Corporation Act, 1919, extracted by me already. The definition of "building" in the Madras Buildings (Lease and Rent Control) Act, 1960, as given in section 2 (2) of the said Act is as follows :

"'building' means any building or hut or part of a building or hut, let or to be let separately for residential purposes and includes (*a*) the garden, grounds and out-houses, if any, appurtenant to such buildings, hut or part of such building or hut and let or to be let along with such building or hut". (The other portions of the definition are not necessary for the purposes of this case).

To accept the argument of the learned Counsel for the petitioner is to incorporate the definition of the term building in the Madras Buildings (Lease and Rent Control) Act, 1960 into the Madras City Municipal Corporation Act, 1919, while the statute itself has not done so. Why the statute has not done so can be easily understood from the fact that under section 100 of the Madras City Municipal Corporation Act, 1919, property tax is payable in respect of buildings not only in the occupation of the tenants but also in the occupation of the owners. Therefore, whether a building is let or not is wholly immaterial and irrelevant for the purpose of liability to pay property tax under the Madras City Municipal Corporation Act, 1919. Hence that a portion of a building is capable of being let out and has been so let out and subsequently remained vacant is wholly irrelevant for the purpose of levy of property tax under the Madras City Municipal Corporation Act, 1919 and consequently for the purpose of remission under section 105 of the Act. Therefore, irrespective of any consideration of hardship or injustice on which great stress was laid by the learned Counsel for the petitioner on the language of section 105 and with reference to the definition of the term "building" occurring in section 3 (4) of the City Municipal Act, 1919, it must be held that the owner of a building is entitled to a remission of the property tax only if the building remains wholly vacant or unlet; and if any portion of the building is in occupation or let out then the provisions of section 105 of the Madras City Municipal Corporation Act, 1919 are not attracted and the owner of the building is not entitled to any remission. Consequently I am unable to accept the second contention of the learned Counsel.

As far as the first contention is concerned, no doubt the Corporation authorities would have been well advised in informing the petitioner, before taking any coercive steps, that she was not entitled to any remission of the tax, and certainly the conduct of the Corporation authorities cannot be commended from any point of view. At the same time I am of the view, that no purpose will be served by giving an opportunity to the petitioner in the context of the facts of this case. With regard to the facts, it is admitted that the portion in the occupation of M/s Sarathi Films is part of the main building, though a small part. Consequently with reference to the claim for remission under section 105 of the Act, there is no point of fact to be enquired into or investigated for the purpose of arriving at a decision whether the petitioner is entitled to remission of property tax or not. Hence I am not satisfied that any case has been made for directing the Corporation authorities now to give an opportunity to the petitioner before taking or enforcing their decision that the petitioner is not entitled to the vacancy remission because the vacancy that occurred was only a partial vacancy. Under these circumstances the writ petition fails and is dismissed. There will be no order as to costs.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. PALANISWAMY.

Messrs. Astrotito Compania Naviour S. A. Power of Attorney Agent, Shaw Wallace and Company Ltd. .. *Applicants**

v.

Messrs. Boots S. A. by Agents South India Corporation (Agencies) Private Ltd. .. *Respondents.*

Arbitration Act (X of 1940), section 34—" Taking any other step in the proceedings"—Filing of application to vacate interim injunction—Amounts to taking such a step.

Where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement, the party against whom such a proceeding is instituted is given a right to apply to the authority for stay of the proceedings. Section 34 of the Arbitration Act which deals with that matter *inter alia* states that such application may be made "at any time before filing a written statement or taking any other steps in the proceedings."

In the instant case, the defendants have not filed a written statement. But they took out an application to vacate the interim injunction and offered to furnish security. Whatever may be the circumstances under which the defendants took out the application, the fact is clear that they took steps in the proceedings within the meaning of section 34 and are, therefore disentitled to ask for stay of the suit.

Query: Section 34 of the Arbitration Act whether applies to foreign arbitration?

K. G. Ramaswami Iyengar and *K. R. Krishnaswamy,* for Applicants.

M/s. King and *Partridge,* for Respondents.

The Court made the following

ORDER.—The defendants, a Private Limited Company, have taken out this application under section 34 of the Arbitration Act, 1940, for stay of all proceedings in the suit. The suit is to recover Rs. 1,63,282-12 on the allegation that the said amount was payable in respect of the use of the plaintiff's vessel "s.s.Stavros," as per charter party dated 17th May, 1968 entered into between the plaintiffs and the defendants at New York, United States of America. Pending the suit, the plaintiffs applied in Application No. 1523 of 1968 for the issue of a temporary injunction restraining the defendants from removing their tanker from the Madras Harbour. Ismail, J., before whom that came up for orders, issued an interim injunction on 2nd August, 1968. The defendants took out Application No. 1564 of 1968 praying that the interim injunction may be vacated and that the bank guarantee of the First National City Bank, Madras, to the tune of Rs. 1,65,000, may be accepted. In view of the undertaking, the learned Judge vacated the interim injunction subject to the furnishing of the security. The defendants have taken out this application alleging *inter alia* that they had to apply to the Court for raising the interim injunction, as on account of the injunction they were put to a recurring loss of about Rs. 18,500 every day, that as per the charter party the dispute between the parties has to be referred to three persons at New York, one to be appointed by each of the parties and the third to be chosen by those two persons, that there is dispute between the parties, that the defendants are ready and willing to abide by the terms of the arbitration clause in the charter party and that, therefore, this Court has no jurisdiction to try the suit, as the matter has to be referred to arbitration.

The plaintiffs oppose this application contending that it is not maintainable inasmuch as the defendants have taken part in the proceedings. They also contend that balance of convenience does not call for stay of the proceedings.

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*C.S. No. 103 of 1968.
Appln. No. 1747 of 1968. 22nd September, 1969.

Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, the party against whom such a proceeding is instituted is given right to apply to the authority for stay of the proceedings. Section 34, which deals with that matter *inter alia* stated that such application may be made "at any time before filing a written statement or taking any other steps in the proceedings." In the instant case, the defendants have not filed the written statement. But they took out Application No. 1564 of 1968 to vacate the interim injunction and offered to furnish security. The question is whether the filing of this application would amount to "taking a step in the proceeding" within the meaning of section 34. At page 369 of Volume I of Halsbury's Laws of England it is observed:

"The applicant must have taken no step in the proceeding after appearance. The party who makes any application whatsoever to the Court, even though merely an application for time, takes a step in the proceeding."

What would amount to "taking step in the proceeding" arose for consideration in a number of cases both English and Indian. In *Ives and Barker* v. *Williams*[1], Lindley, L.J., observed:

"The authorities show that a step in the proceedings means something in the nature of an application to the Court and not a mere talk between the solicitor or solicitor's clerks, nor the writing of letters but the taking of some steps such as taking out a summons or something of that kind which is in the technical sense a step in the proceedings."

In *Ford's Hotel Co.* v. *Bartett*[2], the defendant took out summons for extension of time to file written statement. That was held to be a step in the proceedings. In *County Theatres and Hotels Ltd.* v. *Knowles*[3], the defendant attended the Chambers of the Master on the hearing of a summons for direction taken out by the plaintiffs and an order was passed that the plaintiff and defendant should make discovery of their respective documents. This was held to be a step in the proceedings. In *Ochs Dros*[4], the plaintiff had taken out summons before the Master for certain directions. The defendants attended the hearing before the Master when the Master proposed to treat as a summons for an account and the defendants gave an undertaking to furnish an account as a term of the summons standing over. The Court held this to be a step in the proceeding. In *Richardson* v. *Le Maitre*[5], the defendants appeared before the Master on a summons taken out by the plaintiff for certain directions and in his presence an order was passed. It was held to be a step in the proceeding.

In *Jailal & Co.* v. *Gopi Ram Bhotika*[6], the defendant appeared before the Court and asked the Court to direct the plaintiff to give security for costs. That was held to be taking a step in the proceedings. In *The Karnani Industrial Bank Ltd.* v. *Satya Niranjan Shaw*[7], it was held that it would amount to taking a step in the proceeding even if an oral request is made asking for time for filing written statement. In *Subal Chandra* v. *Md. Ibrahim*[8], the defendant appeared by Counsel in an application filed by the plaintiff for the appointment of a Receiver and obtained an adjournment. That was held to be taking step in the proceedings. In *Ganna Rao* v. *Thiagaraja Rao*[9], the defendant applied for an adjournment for filing counter affidavit and also moved the Court to modify an order of interim injunction issued against him. It was held that those were steps in the proceedings disentitling the defendant from asking for stay under section 34 of the Arbitration Act.

On behalf of the defendants it is contended that the defendants had to take out Application No. 1564 of 1968 to vacate the interim injunction inasmuch as they

1. (1894) 2 Ch. 478 at 484.
2. (1896) A.C. 1 at 4.
3. (1902) 1 K.B. 480.
4. (1909) 2 Ch. 121.
5. (1903) 2 Ch. 222.
6. A.I.R. 1920 Cal. 685.
7. A.I.R. 1924 Cal. 789.
8. I.L.R. (1943) 2 Cal. 298.
9. (1948) 2 M.L.J. 606 : A.I.R. 1949 Mad. 582.

were put to heavy loss of about Rs. 18,500 per day on account of the injunction, and that having regard to that peculiar circumstance, it should be held that the defendants did not voluntarily take part in the proceedings. I am unable to accept this argument. Whatever may be the circumstances under which the defendants took out application in this suit with a prayer to vacate the interim injunction on offer to accept security, the fact is clear that they took steps in the proceedings within the meaning of section 34 and are, therefore, disentitled to ask for stay of the suit.

In the view which I have taken above it is unnecessary to consider the question whether section 34 of the Arbitration Act applies to foreign arbitration or not. In the result, the application fails and is dismissed with costs.

V.K. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE S. GANESAN.

Nithayya Thevar .. *Petitioner**

v.

Subramanian Ambalakarar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 7, rules 11 and 14 (1)—Rejection of plaint under Order 7, rule 11—Document filed along with plaint under Order 7, rule 14 (1), if may be looked into by Court.

Order 7, rule 11 provides that where the suit appears from the statement in the plaint to be barred by any law, the plaint may be rejected. It must be borne in mind that Order 7, rule 14 (1) stipulates that the plaintiff shall produce in Court the document upon which he sues when the plaint is presented. It would therefore be artificial to divorce the said document from the plaint and to contend that the said document which is filed along with and forms the basis of the plaint should not be looked into by the Court. The Court would be perfectly justified in treating the recitals in such a document as part of the statement in the plaint for purposes of rejection under Order 7, rule 11.

Petition under section 25 of Act IX of 1877 praying the High Court to revise the order of the Court of the District Munsif of Tiruthuraipundi, dated 27th September, 1967 and made in S.C. unfiled of 1967.

G. Jagadeesa Ayyar, for Petitioner.

S. R. Sadagopan, for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is directed against the order of the Court of the District Munsif of Tiruthuraipundi made on 27th September, 1967 in an unfiled Small Cause Suit, laid on a promissory note bearing the date 27th Adi, Krodhi year (corresponding to the English date 11th August, 1964). Applying the provisions of section 24 of the Limitation Act and accordingly adopting the Gregorian calendar for computing the period of limitation, 11th August, 1967 being a working day, the District Munsif rejected the suit filed on 14th August, 1967 as barred by time. 12th and 13th of August, 1967 were admittedly holidays.

In paragraph 3 of the plaint it is alleged that the promissory note was executed on 27th Adi, Krodhi year (12th August, 1964) and the learned Counsel relying on the decision of the Madras High Court in *Achuthan Nair* v. *Achuthan Nair*[1], contends that the question as to the date of the promissory note is one of fact to be decided by the evidence and probabilities according to section 96 of the Evidence Act, that section 24 of the Limitation Act creates no presumption as to the date of document but merely provides that the period of limitation shall be worked out according to the Gregorian calendar and that the District Munsif should have decided the question as to the date of the execution of the promissory note during the trial by permitting

* C.R.P. No. 222 of 1968. 3rd March, 1969.

1. (1941) 1 M.L.J. 503: I.L.R. (1941) Mad. 760.

the parties to adduce evidence on this aspect and should not have rejected the suit on the strength of the Tamil date given in the suit promissory note. In that decision the promissory note bore both the English date 16th November, 1934 and the Malayalam date Thulam 30, 1110 (corresponding to 15th November, 1934) and the suit was laid on 16th November, 1937. Wadsworth, J., held that the only question there was which date was wrong and that there was no legal presumption in favour of either. All that the Madras decision lays down is that, where there was no doubt about the exact date on which the suit promissory note was executed, it was a question of fact to be determined on evidence and probabilities and nothing more.

Order 7, rule 11, of the Civil Procedure Code provides that, where the suit appears from the statement in the plaint to be barred by any law, the plaint may be rejected and the contention of the learned Counsel is that the learned District Munsif ought to have held on the pleadings that there was a doubt about the actual date on which the promissory note was executed and should have relegated the question of limitation to be decided during the trial and that he was wrong in looking into the promissory note which admittedly bears only the Tamil date 27th Adi, Krodhi at that stage. The question whether the recitals made in the promissory note, which was admittedly filed by the petitioner along with the plaint, should be treated as part of the statement in the plaint, is not free from difficulty ; and it does not appear that there is any direct decision on this point. One thing, however, is clear and it is that a document which is referred to in, forms the basis of and is filed along with the plaint should be treated as part of the plaint. It must be borne in mind that Order 7, rule 14 (1) stipulates that the plaintiff shall produce in Court the document upon which he sues, when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint. In my view, it would be artificial to divorce the said document from the plaint and to contend that the said document which is admittedly filed along with and forms the basis of the plaint should not be looked into by the Court and should not be regarded as part of the plaint while checking the plaint before filing the suit. Where the allegations in the plaint are at variance with the material recitals in the document which form the basis of the suit, it would be open to the Court to return the plaint for rectification; and in a case of this kind it appears to me clear that the Court would be perfectly justified in treating the recitals in such documents as part of the statement in the plaint for purposes of rejection under Order 7, rule 11 of the Civil Procedure Code.

In this particular instance, the suit filed on 14th August, 1967 on the basis of the suit promissory note which admittedly bears only the Tamil date 27th Adi, Krodhi (corresponding to 11th August, 1964) is clearly barred by time; and the only question for consideration is whether the lower Court was right in basing its rejection on the suit promissory note when the plaint has given two different dates and when the suit is not barred if the English date given in the plaint is acted upon. It is plain that a fraud is sought to be played by the plaintiff on the Court by deliberately giving the wrong English date in the plaint; and it appears to me clear that he should not be permitted to turn round and blame the Court for not adhering to Order 7, rule 11, Civil Procedure Code, strictly to the letter. In cases of this kind it is perfectly open to the Court to rely upon the date given in the document which is admittedly produced along with the plaint and referred to in the schedule, especially when the said date is also referred to in the body of the plaint along with the wrong date. There is absolutely no material to warrant interference in version. The rejection of the plaint is proper.

In the result, the revision petition is dismissed without costs.

V.K. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

Public Prosecutor .. *Appellant**

v.

Subban Chettiar .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954) *as amended by Act (XLIX of* 1964), *sections* 2 (1), (a) (b), 7 (1) *and* 16 (1)—*Offence under sections* 7 (1) *and* 16 (1) *read with section* 2 (1) (a) *and* (b)—*Proof—Attesting witness turning hostile—Conviction, if may be based on Food Inspector's evidence alone.*

Evidence Act (I of 1872), *section* 134—*scope.*

Section 134 of the Evidence Act makes it clear that any fact could be proved even by a single witness. There is a recent trend in cases of this type (offence under section 7 (1) and 16 (1) read with section 2 (1) (*a*) and (*b*) of the Prevention of Food Adulteration Act) and similar cases that the attesting witnesses always turn hostile and by reason of the attesting witnesses turning hostile there is a tendency on the part of Courts below to disbelieve the evidence of the Food Inspector. This trend is really deplorable and the Courts below would do well to keep section 134 in view and then appreciate the evidence of the Food Inspector by that standard laid down in section 134 of the Evidence Act.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (Accused) of an offence under section 7 (1) and 16 (1) read with section 2 (1) (*a*) and (*b*) of the Prevention of Food Adulteration Act, 1954 as amended by Act (XLIX of 1964) by the Court of the Sub-divisional Magistrate, Tirupattur, North Arcot District, in C.C. No. 266 of 1966 on his file.

R. Veeramani for the Public Prosecutor, for Appellant.

S. V. Pandiarajan for *C. K. Venkatanarasimhan*, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the acquittal of Subban Chettiar for an offence under sections 7 (1) and 16 (1) read with section 2 (1) (*a*) and (*b*) of the Prevention of Food Adulteration Act 1954 as amended by Act (XLIX of 1964). The accused is a small vendor owning a retail ghee shop at 19/2, Meenakshi Nilayam in Tirupattur. On 30th June, 1966 at about 9-15 A.M. he had in his possession a tin containing ghee kept exposed for sale in his retail shop and he sold on demand to P.W. 1 500 grams of ghee from the tin in the presence of witnesses for Rs. 5 and on analysis it is found that the sample contained 30 per cent. of fat not derived from milk or cream as calculated from Reichert value, the sample having contained Reichert value of 16.6 only as against the prescribed minimum of 24.

P.W. 1 states in his evidence that Exhibits P-1, P-2 and P-3 were attested by P.W. 2 Abdul Sathar. Exhibit P-1 is the notice. Exhibit P-2 is the receipt for payment of Rs. 5. Exhibit P-3 is the receipt in acknowledgment given by the accused. Exhibit P-4 is the report of the public Analyst.

The learned Sub-Divisional Magistrate acquitted the accused on two grounds: that P.W. 2 did not support the prosecution case and that P.W. 2's address has not been mentioned in Exhibit P-1. Section 134 of the Evidence Act is extracted here below:

> " No particular number of witnesses shall in any case be required for the proof of any fact."

In terms of section 10 (1) (*a*) and sub-section (7) of Act (XXXVII of 1954) (Prevention of Food Adulteration Act), the Food Inspector (P.W. 1) shall call one or more persons to be present at the time when such action is taken and take his or their signature. This is precisely what P.W. 1 has done when he got the signature of P.W. 2. So far

* Crl. A. No. 416 of 1967. 11th April, 1969.

as the failure on the part of P.W. 1 to record the address of P.W. 2 is concerned, it has really no material bearing on the appreciation of the evidence of P.W. 1. P.W. 2 admits that he has a soda shop at Meenakshi Nilayam. When he admits he is a neighbour running a soda shop, here is P.W. 2 with an address of his own as proved by the evidence of P.W. 2 himself. The learned Magistrate erred in permitting the absence of the address of P.W. 2 being recorded to influence his appreciation of the evidence of P.W. 1. The learned Sub-Divisional Magistrate ought to have seen that no motive is suggested against P.W. 1 by the accused and in the absence of any motive or enmity alleged against P.W. 1, the facts proved by P.W. 1 are acceptable. Section 134 of the Evidence Act makes it clear that any fact could be proved even by a single witness. There is a recent trend in cases of this type and similar cases that the attesting witnesses always turn hostile and by reason of the attesting witnesses turning hostile there is a tendency on the part of the Courts below to disbelieve the evidence of P.W. 1 or the Food Inspector. This trend is really deplorable and the Courts below would do well to keep section 134 of the Evidence Act in view and then appreciate the evidence of the Food Inspector by that standard laid in section 134 of the Evidence Act. I believe the evidence of P.W. 1 regarding the facts spoken to by him about his purchase of ghee and his giving a sum of Rs. 5 for the purchase of the ghee and also his obtaining the acknowledgment from the accused and his sending the sample to the Public Analyst. The contents of Exhibit P-4 have not been challenged in cross-examination. In this Court the Counsel for the respondent had not even argued before me as to how there has been any delay in analysis and how this alleged or supposed delay contributed to incriminating excess. It is surprising how the learned Sub-Divisional Magistrate used this ground where there is absolutely no material on record even in the cross-examination of P.W. 1 for basing his order of acquittal. The second ground on which the order of acquittal is based is totally untenable. Such an inference is not warranted on the material elicited on behalf of the accused in the cross-examination of P.W. 1.

In the result, the appeal is allowed. The respondent is convicted under section 7 (1) and section 16 (1) read with section 2 (1) (*a*) and (*b*) of the Prevention of Food Adulteration Act, 1954 as amended by Act (XLIX of 1964), is sentenced to pay a fine of Rs. 100; in default, to two months' rigorous imprisonment. Time for payment of fine is one month.

V.K. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

Pitchiah Pillai .. *Petitioner**

Madras City Police Act (III of 1888), section 75—Indecent or disorderly behaviour, what constitutes—Utterance of filthy and outrageous language in a public place, if punishable under section 75.

The act of the petitioner in uttering filthy and outrageous language in the presence of six prosecution witnesses certainly amounts to disorderly or indecent behaviour within the meaning of section 75 of the Madras City Police Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Koilpatti, dated 10th June, 1967 and passed in C.A. No. 13 of 1967 (C.C. No. 45 of 1967 on the file of the Court of the Sub-Magistrate, Koilpatti).

G. Krishnan for *N. T. Vanamamalai* and *V. Gopinath*, for Petitioner.

S. Jagadeesan, for the Public Prosecutor, for State.

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*Crl. R.C. No. 1119 of 1967. 31st July 1969.
Crl. R.P. No. 1105 of 1967.

The Court made the following

ORDER.—The petitioner Pitchaiah Pillai seeks to revise his conviction under section 75 of the Madras City Police Act (III of 1888). The only question that arises in this case is whether the words attributed to the accused (petitioner) as proved by the evidence of P.Ws. 1 to 6, do constitute indecent or disorderly behaviour in any public place. The Counsel for the petitioner did not dispute that the occurrence has taken place in a public place. The prosecution case is that the petitioner came to the front of a pial in the house of P.W. 6 at Kadambur. P.Ws. 2, 4 and 5 were also there. P.W. 1, the complainant is the karnam of Kadambur and he was talking to the Executive Officer on the pial. At that time, the petitioner came there and questioned P.W. 2 as to what happened to the pipe connection to the house of one Chidambara Nadar applied for by him to the Panchayat Board. P.W. 2 replied that the matter was settled amicably with the assistance of the karnam. Thereupon, the petitioner used obscene language against P.W. 1 as follows :—

> " What for this karnam has come up here ? What does he know ? Son born of *pudendum muliebre* (Obscene in tamil affecting the character). He should be beaten by chappal."

Then P.W. 1 questioned the petitioner. He was further abused by the petitioner. A crowd gathered and the appellant went away. Substantially, P.Ws. 1 to 5 speak to this version of the prosecution case. P.W. 6 states that the petitioner abused P.W. 1 in filthy language. P.W. 1 questioned the propriety of the behaviour of the petitioner and then he went away. Both the Courts below have accepted the entire evidence of P.Ws. 1 to 6. I see no reason to differ from the Courts below in accepting the evidence of P.Ws. 1 to 6 in this matter. The question is whether this will tantamount to disorderly or indecent behaviour. It is argued before me on the authority of the ruling in *K.J. Verghese* v. *State*[1], that this behaviour of the petitioner in abusing P.W. 1 in a public place may be bad behaviour, but may not amount to indecent behaviour. I am not able to accept this argument. The language is so filthy and outrageous and the petitioner uttered it in the presence of six prosecution witnesses. Certainly, it amount to disorderly or indecent behaviour within the meaning of section 75 of the Madras City Police Act. Behaviour can be seen and spelt out only from the words uttered. The utterance of the language quoted above, in my opinion, does constitute disorderly or indecent behaviour. The utterance of the words found in the ruling is not to be compared with the language employed by the petitioner against P.W. 1 in this case. The other ruling cited by the Counsel for the petitioner is *Kannammal, In re*[2] and it is certainly not helpful to him. That was a case where a Police Officer giving evidence cannot be permitted to virtually pronounce a judgment by merely using the words of the section without furnishing any detail. In fact in this case all the particulars of the abusive language indicating the behaviour of the petitioner are given and proved. Anantanarayanan, J. as he then was, observes:

> " The ingredients of the offence are acts which can be interpreted as amounting to riotous, disorderly and indecent behaviour in a public street. Behaviour might either be physical movements of the body, or words uttered by a person or compounded of both."

Judged from the standpoint of the words uttered by the petitioner, I have no doubt that they do constitute disorderly or indecent behaviour within the mischief and ambit of section 75 of the Act. There are no other merits in this revision petition. The conviction is correct and proper. The revision petition is dismissed.

V.M.K. *Petition dismissed.*

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1. (1950) M.W.N. (Crl.) 297 : (1950) 2 M.L.J. 199 : A.I.R. 1950 Mad. 789.
2. (1966) L.W. (Crl.) 57.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

L. R. Srinivasa Chetty .. .. *Petitioner* *

Criminal Law—Public servant—Seizure of the cycle for not having displayed the licence disc, though it had licence—Public servant acting in good faith under the colour of his office—Seizure, if justified.

Where the Municipal Inspector acting in his capacity as a public servant, seizes the cycle for not having the licence disc even though the cycle in question had the licence from the Village Panchayat seizure of the cycle is correct and legal, because he was acting in good faith under the colour of his office.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Additional First Class Magistrate, Vellore, dated 31st March, 1967 and passed in C.C. No. 31 of 1967.

K. Ramaswamy, for Petitioner.

S. Jagadeesan, for the Public Prosecutor, for State.

The Court made the following

ORDER.—On 11th January, 1967 the cycle of the son of Srinivasa Chetty was detained by the Municipal Inspector, P.W. 1 for want of a licence. The boy went and brought his father who slapped P.W. 1 on his cheek and took away the cycle from him by force. The evidence of P.W. 1 who proves these facts is corroborated by P.W. 2. P.W. 3 received the complaint from P.W. 1 and sent P.W. 1 and the complaint to the Police Station. P.W. 4, the doctor, speaks to the injury sustained by P.W. 1.

Accepting this evidence, the Additional First Class Magistrate found the petitioner guilty of an offence under section 332, Indian Penal Code.

P.W. 1 admits in the course of his cross-examination that if the cycle had village licence he would not demand licence and states that the boy Chelapathi, son of the accused, did not tell him that he had village licence. Exhibit D-2 is the village licence for 1966-67 for the second half year. It has been issued in the name of the accused. M.O. 2 is the disc in respect of that licence. It emerges from the evidence that the cycle did not carry this disc. The argument of Mr. Ramaswami is that inasmuch as the cycle in question had the licence from the Village Panchayat and regardless of the fact that the disc was not displayed on the cycle, although P.W. 1 had acted in his capacity as a public servant in the discharge of his duties, the seizure is illegal and therefore the petitioner had a right to take back his cycle and his act of slapping P.W. 1 amounts to an offence under section 323, Indian Penal Code. This argument, if accepted, would result in an anomalous reasoning whether P.W. 1 acted as a public servant in the discharge of his official duties and this illogical finding regarding his act of seizure is not in consonance with law. I am not prepared to countenance this argument in the face of the evidence which certainly supports the finding that P.W. 1 was acting in his capacity as a public servant and in the discharge of his official duties he seized the cycle. The seizure of the cycle is correct and legal. Apart from that, I have no doubt in my mind that P.W. 1 was doing an act in his capacity as a public servant, acting in good faith under the colour of his office. The act of P.W. 1 is also strictly justifiable by law. In support of the proposition of law contended for by Mr. Ramaswami, he attempted to draw support from the ruling in *Pedda Muni Reddi and another* v. *Emperor*[1]. That was a case where the constable P.W. 1 had no authority to effect the arrest since there was no order in writing under section 56 (1) of the Code of Criminal Procedure and the

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* Crl. R.C. No. 758 of 1967.
Crl. R. P. No. 748 of 1967. 1st August, 1969.

1. (1948) 1 M.L.J. 377 : (1948) M.W.N. (Crl.) 68.

constable did not purport to act on his own accord, because there was nothing to show that the elements necessary to justify the action under section 54, Criminal Procedure Code, were present, the act of P.W. 1 was not that of a public servant but of an ordinary individual. Another authority was also cited before me. In *Public Prosecutor* v. *Syed Rowther and another*[1], Anantanarayanan, J., (as he then was) found that the officers had forcibly entered into the private house of the first respondent and attempted to seize some note-books merely on the allegation that they were accounts of the business. The learned Judge found that the records did not even show that the respondent had really carried on any business as dealer. It is seen from these two decisions that initially there is a total lack of jurisdiction on the part of these officers to act as they did in their official capacities. These two decisions are not helpful to the proposition of law submitted by Mr. Ramaswami. In my view, the conviction of the petitioner for an offence under section 332, Indian Penal Code, is correct and proper. There are no grounds for me to interfere with the conviction of the petitioner.

Mr. Ramaswami made an eloquent plea that in view of the status of the petitioner, the sentence of fine may be substituted for by admonition. Although one is disposed to take the stern view that a Municipal Councillor must exercise a greater sense of responsibility in his dealings with public servants who discharge their official duties in the interest of public service, I am inclined to think that the interests of justice would be served by admonishing the petitioner under section 3 (1) of the Probation of Offenders Act in view of the fact that the accused is a first offender. The fine amount may be directed to be returned to the petitioner. With this modification, this revision petition is dismissed.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY

S. Marichamy Pillai .. *Petitioner**

v.

Meenakshisundaram Pillai and another .. *Respondents*

Criminal Procedure Code (V of 1898), section 247—Summons case—Private complaint by a Head Constable—Complainant, not a witness to the occurrence—Non-appearance of the complainant, if justifies acquittal of the accused.

Where the Magistrate could have applied the proviso to section 247 of the Criminal Procedure Code as the personal attendance of the Head Constable who merely filed a private complaint, not being a witness to the occurrence, was not necessary and could have dispensed with his attendance, acquittal of the respondents under section 247 is not warranted and the order of acquittal has to be set aside.

Petition under section 435 and 439 and 561-A of the Code of Criminal Procedure, 1898 praying the High Court to revise the Judgments of the Court of the Special First Class Magistrate, Uthamapalayam, dated 10th September, 1968 and made in S.T.C. No. 608 of 1968.

C. F. Louis, for Petitioner.

The Additional Public Prosecutor, for State.

The Court made the following

ORDER.—This is a very simple case. A Head Constable filed a complaint under section 323, Indian Penal Code, which is a non-cognizable case before the

1. (1961) M.W.N. 496: (1962) 2 M.L.J. 87 : 117.
(1962) M.L.J. (Crl.) 407: (1961) M.W.N. (Crl.)

* Crl. R.C. No. 1363 of 1968.
Crl. R.P. No. 1343 of 1968.

4th August, 1969.

Special First Class Magistrate. The process was issued to the respondents and as the police officer who filed the complaint was absent on the day when the trial was posted, the respondents were acquitted under section 247, Criminal Procedure Code. It is true under section 247, Criminal Procedure Code, in a summons case on a private complaint, the absence of the complainant would be sufficient reason for acquitting the accused unless for some other reason the case is adjourned to some other date. This is a peculiar case where the Head Constable filed a complaint which was taken cognizance of under section 323, Indian Penal Code, but the victims are private parties. It is not known as to why the Head Constable filed a private complaint without referring the victims to file a complaint under section 323, Indian Penal Code as the offence is undoubtedly a non-cognizable one. The complaint filed by him is not as a result of investigation under Chapter XIV of the Code of Criminal Procedure. The Special First Class Magistrate must have exercised his discretion provided under the proviso to section 247 in this case. The Head Constable is a public servant. He need not be examined on oath before taking cognizance of the case as provided in proviso (aa) to section 200, Criminal Procedure Code. His evidence is not at all necessary for deciding a case. In such a case when the examination of the complainant, a public servant, is dispensed with under proviso (aa) to section 200, Criminal Procedure Code, applying the same principle, unless his evidence is necessary for the purpose of a decision, his attendance in the Court for the purpose of trial will be practically of no use. In a private complaint, normally the complainant being the main witness whose evidence has to be corroborated by other witnesses, his attendance would be necessary and without him the trial could not proceed as his presence not only at the time when he is examined and even subsequently would be necessary, for, a necessity for his re-examination may arise, for identification and for other similar purposes. Proviso to section 247, Criminal Procedure Code, makes it clear that where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. This is a fit case where the Magistrate could have applied the proviso as the personal attendance of the Head Constable who merely filed a complaint, not being a witness to the occurrence, was not necessary and could have dispensed with his attendance. I therefore set aside the order of acquittal holding that the attendance of the Head Constable was not at all necessary and order retrial. The case is remanded to the District Magistrate of Mathurai, who may himself take up the case and try or may direct any Sub-Magistrate to try and dispose of the case in accordance with law.

V.M.K. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

B. K. Varma .. *Petitioner**

v.

Corporation of Madras, by its Sanitary Inspector, 67-68 Division. .. *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), sections 2 and 17—Scope—Misbranding—Guilt in a purely technical sense—Section 95, Indian Penal Code, if could be applied—Prosecution of the Plant Superintendent, and not the company—Petitioner, if entitled to the benefit of doubt.

The finding of the Public Analyst was that, though the margin of Saccharine was found to be negligible, technically it must be deemed to be misbranded under section 2 (*ix*) (*k*) of the Prevention of Food Adulteration Act. Instead of filing complaint against the company and other persons responsible for the act, the complaint has been filed against the revision petitioner who was responsible only for the bottling of the liquid and for nothing else. In this circumstance, it is doubtful whether the revision petitioner was in charge of the firm in respect of

* Crl. R.C. 799 of 1969.
Crl. R.P. No. 785 of 1969. 10th September, 1969.

the manufacture or sale of Coca-Cola. He will, therefore, be entitled to the benefit of doubt. Apart from this, this is a case where section 95 of the Indian Penal Code can be applied, taking into consideration the nature of the offence committed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 8th March, 1969 and made in M.F. No. 522 of 1968.

T. R. Srinivasan, for Petitioner.

T. A. Ramaswamy Reddy, for Respondent.

The Additional Public Prosecutor, for State.

The Court made the following

ORDER.—The revision petitioner was convicted under section 16, 2 and 7 of the Prevention of Food Adulteration Act (hereinafter called 'the Act') read with rules 32 and 47 of the Rules framed thereunder and released on admonition, by the Chief Presidency Magistrate, Madras.

The revision petitioner is the Plant Superintendent of the Southern Bottlers Private Limited, who are the manufactures of a beverage-aerated water, known as Coca-Cola. A complaint was received form Dindigul to the effect that the Coca-Cola that was being marketed there was found to cause intoxication and the complaint was forwarded to the Government for necessary action being taken. P.W. 1 Ramachandran, the Sanitary Inspector of 66-67 Divisions, Madras, went to Messrs Southern Bottlers Private Limited, at No. 26, Mount Road, at about 9-30 A.M. on 22nd July, 1968 and after observing the formalities, he took nine bottles of Coca-Cola from the place where it was manufactured and paid the price therefor to the revision petitioner who was present then. On analysis by the Public Analyst, it was found that the sample was sweetened artificially with the addition of 0.03 per cent. of saccharine. According to the Public Analyst, though the margin of Saccharine was found to be negligible, technically it must be deemed to be misbranded under section 2 (*ix*) (*k*) of the Act. P.W. 1, after receiving the report from the Public Analyst, filed the complaint against the revision petitioner in his capacity as the Plant Superintendent of Southern Bottlers Private Limited.

Several points were raised before the learned Chief Presidency Magistrate. But before me, the learned Counsel for the petitioner confined himself to one point, namely, that since the offence was committed by a company, the prosecution should have filed the complaint against the company and the persons in charge of or responsible to the company for the conduct of the business of the company. He further submitted that there was no material on record to show that though the revision petitioner was the Plant Superintendent that he was either in charge of or was responsible to the company for the conduct of the business of the company and that, therefore, his conviction cannot be sustained. There cannot be any doubt in this case that the offence, if committed, was committed by the company. Learned Counsel for the Corporation is unable to say as to why the company was not prosecuted. However, he admitted that the company could have been prosecuted as the offence must have been deemed to be committed by the company as the manufacturers. Southern Bottlers Private Limited, is a company under section 17 of the Act. It is stated by the learned Counsel for the Corporation that the petitioner was prosecuted as a vendor as he sold Coca-Cola bottles to P.W. 1 for a price and that, therefore, he would come under sections 7 and 16 of the Act. I am unable to agree with him. Once the offence is committed by the company, the procedure that has to be followed is only under section 17 of the Act. Section 17 runs thus:

"*Offences by companies* : (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business

of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

2. Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section

(*a*) "company" means any body corporate, and includes a firm or other association of individuals; and

(*b*) "director" in relation to a firm means a partner in the firm."

It is, therefore, clear from section 17 that under clause (1) if the offence was committed by the company, the company as well as the person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, and under clause (2) if the offence was committed with the consent or connivance of, or was attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such persons mentioned therein shall be liable to be proceeded against and punished. The prosecution, therefore, must have filed a complaint against the company first and then against the persons against whom they could proceed under section 17 (1) and (2) of the Act. It is, therefore, clear from the complaint itself that the revision petitioner has been prosecuted not in his individual capacity as a vendor but in the capacity of a person employed by the firm as the Plant Superintendent. There is nothing on record to show, as suggested by the learned Counsel for the petitioner, that the Plant Superintendent was a person responsible or in charge of or responsible to the manufacture or sale of Coca-Cola. In his statement under section 342, Criminal Procedure Code, the petitioner stated that he was only responsible for the bottling of the liquid and for nothing else. In this circumstance, it is doubtful whether the revision petitioner was in charge of the firm in respect of the manufacture or sale of Coca-Cola. He will, however, be entitled to the benefit of doubt. Apart from this I am of the view that this is a case where section 95, Indian Penal Code, can be applied, taking into consideration the nature of the offence committed. Section 95, Indian Penal Code, reads thus:

"Nothing is an offence by reason that it causes or that it is intended to cause or that it is known to be likely to cause, any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such a harm."

"Offence" includes an "offence" under the local law or special law under the definition of section 40, Indian Penal Code. Section 95, Indian Penal Code, therefore, will apply to special law like Prevention of Food Adulteration Act also.

The learned Chief Presidency Magistrate, in relation to the nature of the offence committed by the revision petitioner, has observed as follows:

"The accused must therefore be found guilty in a purely technical sense. In my view this prosecution has served no purpose and is in fact wholly unnecessary. When the report of the Analyst disclosed nothing serious at all the sanctioning authority at least could have exercised discretion properly and allowed the matter to be dropped instead of launching on a prosecution which is clearly pointless. I am afraid it is prosecutions such as this that create an impression of harassment and contribute to bringing the law into disrepute. It is wholly

unnecessary to impose any other punishment, in the circumstances of this case, except to admonish the accused. Admonished accordingly."

With these observations, the learned Chief Presidency Magistrate must have applied section 95, Indian Penal Code, and acquitted the petitioner as, even though it may be an offence, it cannot be deemed to be an offence under law by virtue of section 95, Indian Penal Code. In the result, the conviction is set aside and the revision petitioner is acquitted.

The revision petition is, therefore, allowed.

V.M.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE B. S. SOMASUNDARAM.

Abdul Khader .. *Appellant**

Penal Code (*XLV of* 1860), *section* 493—*Co-habitation with a woman after contracting a marriage with her which turns out to be illegal—Co-habitation, if amounts to deception under section* 493.

Section 493 of the Indian Penal Code punishes a man for obtaining the body of the woman by deceitfully assuring her that he had acquired that right by *jus mariti*, but it is not intended to punish one for contracting a marriage which turns out to be illegal.

Appeal against the Judgment of the Sessions Judge of the Court of Session of the Dharmapuri Division at Krishnagiri in Case No. 52 of the Calendar for 1967 dated 12th January, 1968.

C. K. Venkatanarasimhan, for Appellant.

S. Jagadeesan, for the Public Prosecutor, for State.

The Court delivered the following

JUDGMENT.—Abdul Khadar, the appellant herein, stands convicted and sentenced by the Sessions Judge, Dharmapuri Division, at Krishnagiri, to suffer rigorous imprisonment for two years for an offence under section 493 of the Indian Penal Code. Section 493 of the Indian Penal Code punishes persons who cohabit with a woman after deceitfully making a belief in her that she was legally married to him. The prosecution case was that on 16th January, 1967, the appellant by deceit, made P.W. 1 believe, that she was married to him and after creating such a belief in her mind, he made her cohabit with him. The defence of the appellant was one of denial. The learned Sessions Judge found that the appellant went through a form of marriage knowing that it was not the proper form and thereby deceived P.W. 1 and made her have sexual intercourse with him. The appellant is not a stranger to P.W. 1 because he is her cousin. He had given a new saree and ear ornaments to her. There was also an exchange of garlands in the presence of P.Ws. 3, 4 and one Lal Batcha. They lived together as husband and wife for a few days. The appellant had taken P.W. 1 to his house, and after two days, his sister, brother-in-law and father had pushed P.W. 1 out. The appellant had asked her to remain with her grandmother stating that he would fix up a house and then take her. The appellant had also admitted to P.W. 5 that he had married P.W. 1. These circumstances establish that he never practised any deception on her. The section is not intended to punish one for contracting a marriage which turns out to be illegal. But it only punishes a man for obtaining the body of the woman by deceitfully assuring her that he had acquired that right by *jus mariti*. P.W. 1 in this case was lawfully married to the petitioner. Further, there has been no deceitful assurance or act on his part so as to attract section 493 of the Indian Penal Code. The conviction is not correct. Both the conviction and sentence are set aside. The appellant is acquitted of the offence under which he stands convicted. The bail bond will stand cancelled. The appeal is allowed.

V.M.K. ——— *Appeal allowed.*

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* Crl. A. No. 16 of 1968. 23rd September, 1969.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Sankaranarayana Reddiar .. *Appellant**

v.

Ramaswami Reddiar and another .. *Respondents.*

Transfer of Property—Sale deed—Terms and schedule of—Interpretation—Vendor selling southern portion of his land (encumbered 5 cents and unencumbered 20 cents) describing it as unencumbered—Preamble and operative portion not describing the property sold—Schedule making the extent of property sold (25 cents) clear, but not the northern boundary line—Terms of the documents describing property as unencumbered, if controls the interpretation of the schedule—Falsa demonstratio.

One *S* was the owner of land of an extent of 1 acre and 10 cents. While the northern 90 cents out of 1 acre and 10 cents had been in the possession of the usufructuary mortgagees, the defendant purchased an extent of 25 cents in the southern portion of the property. The sale deed makes no reference whatsoever to the usufructuary mortgage. The preamble to the sale deed and the operative portion of it do not describe the property sold. In the operative portion the property sold, is referred to as the land described in the schedule to the deed. So it is the schedule of property that sets out the property sold.

Did the vendor intend to convey full 25 cents or only the remaining 20 cents in the south, which alone had been in his possession at the time of the sale in favour of the defendant?

Held, that in the schedule there are three descriptions given for identifying the property : (1) its location with reference to the entire survey field, in the south (2) its extent in the south and (3) its boundaries. The extent of the property sold, namely, 25 cents has been emphasised in the schedule thrice, twice in numerals and once in letters. There is no dispute about the eastern, western and southern boundaries of the property sold. But the northern boundary is imprecise. Whether the northern boundary line runs so as to give the vendee 25 cents or runs so as to limit it to 20 cents is the question.

The terms of the document have to govern when they are clear and evidence cannot be let in which goes against the unambiguous terms of the deed. The Court has to go by the deed, and, if only there is ambiguity in the deed and the descriptions conflict it could be examined by reference to surrounding circumstances, to drop any part of the description as *falsa demonstratio*. If on a reasonable interpretation the grant could be localised, that must be adopted. The rule *falsa demonstratio non nocet* (a false description does not harm or does not vitiate the deed) is subject to this that words which form an essential part of the description can never be rejected. There can be no *a priori* assumption that, where extent and boundaries are given, the extent must be discarded. If the property conveyed is sufficiently defined by a general description, say by boundaries and it is clearly identifiable therefrom no special description is required and if employed may be useless. But, where the general description indicates, as in this case, more than one possibility and the special description indicates which of the possibilities is meant, the special description restricts the general one and makes it specific. Where the description is general and also special, those parcels of land will pass which satisfy both the descriptions. In this case if the vendee gets 25 cents in the south, then every part of the description, description by boundaries, description by direction and description by extent, will be satisfied. The property conveyed will be true to boundaries and true to extent. The assumption that the vendor intended to convey only property not usufructuarily mortgaged is merely a supposition. When effect could be given to the deed to its fullest extent, there is no reason why there should be a limit to the conveyance by relying upon a supposi-

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* S.A. No. 1685 of 1965. 28th October. 1969.

tion. If the intention was to exclude property subject to the usufructuary mortgage, in describing the boundaries the executant could well have referred to the usufructuary mortgage and the possession by the usufructuary mortgagees of the land in the north. The absence of any such reference is indicative of the fact that the usufructuary mortgage was not the determining factor with reference to the conveyance. There is also this fact that the usufructuary mortgage being by a registered instrument, it can be presumed that the vendee had knowledge of the subsistence of the usufructuary mortgage over an extent of 90 cents in the survey field in question.

Appeal against the decree of the Court of the Additional District Judge, Tirunelveli in Appeal Suit No. 32 of 1963, preferred against the decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 629 of 1961.

R. Ramamurti Aiyar, for Appellant.

K. Sarvabhauman and *T.R. Mani*, for Respondents.

The Court delivered the following

JUDGMENT:—The dispute in this second appeal relates to an extent of 5 cents of land. The defendant who has failed in both the Courts below, is the appellant. One Subbaraya Reddiar was the owner of S. No. 2215/5D1 of an extent of 1 acre and 10 cents in Moolaikaraipatti Panchayat limits. Under Exhibit A-1 dated 4th November, 1951, he othied an extent of 90 cents in S.No. 2215/5D1 in favour of one Subbammal and another for Rs. 1,000. Under Exhibit B-1, dated 25th September, 1954, the defendant purchased an extent of 25 cents in the southern portion of the property for a sum of Rs. 700. The plaintiffs have purported to purchase under the registered sale deed Exhibit A-2 dated 14th November, 1960 the extent of 90 cents, usufructuarily mortgaged to Subbammal and another, for a sum of Rs. 1,500. Under Exhibit A-3 dated 17th November, 1960, the plaintiffs discharged the usufructuary mortgage. The plaintiffs have filed the suit claiming that they are entitled to the entire 90 cents in the north and the defendant's claim for 25 cents in the survey field is untenable. According to the plaintiffs, the defendant is entitled only to 20 cents in the south and no more. The plaintiffs charge the defendant with attempting to encroach to an extent of 5 cents on land which they redeemed from the usufructuary mortgagees, by virtue of their title to 90 cents under the sale deed Exhibit A-2. The Courts below have granted the plaintiffs declaration of their title to the entire 90 cents in the north in S.No. 2215/5 D1 and issued the consequential injunction prayed for. The defendant's purchase has been limited to 20 cents.

There is no dispute that the total extent of S. No. 2215/5 D1 is 1 acre and 10 cents, and Subbaraya Reddiar has only this extent in his enjoyment. It is the finding of the Courts below that the northern 90 cents out of 1 acre and 10 cents had been in the possession of the usufructuary mortgagees under Exhibit A-2 till redemption. At the time of the sale in favour of the defendant, Subbaraya Reddiar had been in possession of only the remaining 20 cents in the south. The case of the defendant that the land of an extent of 25 cents in the south was measured and possession of it was given to him, has been found against, quite properly, as the mortgagees had possession of 90 cents. The ultimate observation of the appellate Court shows the approach of the Courts below to the determination of the case. It is observed: 'D.W. 1 (defendant) confesses that at the time of Exhibit B-1, Exhibit A-1 was still subsisting, that the in mortgagees were in possession of the 90 cents (covered by Exhibit A-1) and that remaining property was lying vacant at the time of his purchase. This admission.........conclusively establishes that Exhibit A-1 property was in the possession of the mortgagees and under their cultivation and that it is exactly this property of the northern 90 cents which Subbaraya Reddiar sold to the respondent under Exhibit A-2, to the exclusion of the remaining land of 20 cents, which was vacant and which he sold to the appellant as per Exhibit B-1......' The Court below would hold that, notwithstanding the fact that Exhibit A-2 is later in point of time and fact than Exhibit B-1, it takes precedence over Exhibit B-1. The emphasis

which the Courts below would place is on the fact that the entire extent of 90 cents was under the usufructuary mortgagees and Subbaraya Reddiar could have sold free of encumbrance, only the remaining 20 cents.

Learned Counsel for the appellant contends that the Courts below have not borne in mind the principles applicable in a case of this kind. The appellant has purchased the specific extent of 25 cents in the south. His vendor was entitled to convey that extent to him, notwithstanding that there was an outstanding encumbrance over a part of it, and the same was in the possession of the usufructuary mortgagees. Learned Counsel submits and rightly that, when a specific extent of property is conveyed and the vendor has a right to make the conveyance, the title of the purchaser to the property is absolute. The purchaser can pursue his remedies against vendor if there is an encumbrance over a part of the property and part of the property is not given immediate possession. But the subsequent purchaser cannot, on that account, contend that the vendor could not convey that part of the property. The short question for consideration is whether the vendor Subbaraya Reddiyar intended to convey full 25 cents. There could be no question about the competency of the vendor to convey the 25 cents in the south. It may be that the vendor was not really in a position to give possession of the 5 cents, but that would not affect his right or title to convey 25 cents. The defendant has admittedly purchased the property, of the extent of 25 cents for putting up a cinema theatre. The sale deed Exhbit B-1 makes no reference whatsoever to the usufructuary mortgage. The preamble to the sale deed and the operative portion of it do not describe the property sold. In the operative portion the property sold, is referred to as the land described in the schedule to the deed. So it is the schedule of property that sets out the property sold. For the plaintiffs, reliance has been placed on the recital in Exhibit B-1 that "having received the full consideration as hereunder I have now left for your enjoyment the land described in the schedule", and also the recital "I declare that there is no encumbrance on the schedule land." I shall now set out the schedule itself: "In Moolakaraipatti Panchayat Board limits, Tirunelveli District Moolakaraipatti Sub Registration District, Moolakaraipatti village, Ayan Punja S. No. 2215/5 D 1,1 acre and 10 cents: within this, in the south 25 cents, boundaries whereof: south of the land retained by me and well; west of Venkatasubbaraya Chettiar's land: north of Poromboke path way and east of your people's land, twentyfive (25 cents whole (முழுவதும்))." There is no dispute above the eastern, western and sothern boundaries of the property sold. The extent of the property sold, namely, 25 cents, has been emphasised in the schedule thrice, twice in numerals and once in letters. But according to the plaintiffs the defendant is entitled under this document only to 20 cents. The difficulty is about fixing the northern boundary of the property sold. If the boundaries are specific and clear they could and so would govern. Here the northern boundary cannot be said as clearly defined: as a boundary line it is imprecise. Whether the northern boundary line runs so as to give the vendee 25 cents or runs as to limit it to 20 cents is the question. As it is, it can run anywhere within the field, and still be true to its description. In the schedule there are three descriptions given for identifying the property:

(1) its location with reference to the entire survey field in the south,

(2) its extent in the south,

(3) its boundaries.

It is contended for the plaintiffs that the property sold to the defendant is unencumbered property and that defines the location of the northern boundary. So we have to consider first whether the description of the property in the body of the document as unencumbered property, has to prevail and control the interpretation of the schedule.

In *Zamindar of Sivaganga* v. *Karuthan Ambalam*[1], it is said that, where the question is as to the actual extent of land that was conveyed by a deed, whether the whole

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1. (1938) 2 M.L.J. 490.

land included in the boundaries which are mentioned in the description in the deed, or only the particular area set out therein, it is not premissible, whatever the intention of the parties in fact may have been, to receive extraneous evidence in explanation of the terms of the deed, where the terms of the deed are clear and unambiguous. But, where the terms of the deed are not clear and unambiguous and there is some inconsistency between the different parts of the same documents, the only way of solving the ambiguity if any, is to look at the surrounding circumstances, namely, the circumstances which led to the grant and the circumstances subsequent to the grant in order to discover whether any portion of the instrument amounts to a *falsa demonstratio* The terms of the document have to govern when they are clear and evidence can not be let in which goes against the unambiguous terms of the deed. The Court has to go by the deed, and, if only there is ambiguity in the deed and the descriptions conflict it could be examined by reference to surrounding circumstances, to drop any part of the description as *falsa demonstratio*. If on a reasonable interpretation the grant could be localised, that must be adopted. The rul *falsa demonstratio non nocet* (a false description does not harm or does not vitiate the deed) is subject to this that words which form an essential part of the description can never be rejected. Lord Sumner pointed out in *Eastwood* v. *Ashton*[1], that the latin maxim is deficient and he would add to it "*cum de corpore constat*" when the thing is described with certainty. The principle is that when there is an adequate and sufficient definition of what was intended to be passed by a deed, any addition to the definition will not vitiate it. In *Eastwood* v. *Ashton*[1], Lord Parker observed that there is no general rule as to which of two inconsistent descriptions is to prevail and the doctrine of *falsa demonstratio* is useless, unless and until the Court has made up its mind as to which of the two or more conflicting descriptions ought, under the proved circumstances of the case, to be considered to be the true description. There can be no *apriori* assumption that, where extent and boundaries are given, the extent must be discarded. The Court has to find out from all the circumstances which is the essential part of the description and unambiguous. In this case, the reference to the property as unencumbered property in the body of the document giving an assurance as to the absence of encumbrance, cannot affect the description of the propery conveyed. In more than one place in the body of the document, it is specifically stated that the property conveyed is set out in the schedule. The body of the document does not purport to describe the property conveyed for the purpose of identification. The reference to the absence of encumbrance in the body of the document in the context of the recital is a covenant against encumbrance and not descriptive of the property sold. Under section 55 (1) (*g*) of the Transfer of Property Act, the seller is bound to discharge all encumbrances on the property then existing, when the property is sold not subject to encumbrance. The seller is bound to give, on being so required, such possession of the property as its nature admits, and in this case the vendor is bound to secure to the vendee actual possession of the property sold. If there is breach of obligations in this regard, the vendee may have his remedy against the vendor. If they are conditions of the contract he may at his option in a given case avoid the contract. True, during the subsistence of the usufructuary mortgage the vendee may not be able to get possession of his five cents, unless the mortgagees are prepared to permit him to redeem piecemeal the five cents. Or, the vendee may redeem the entire extent in his right as co-mortgagor: he may compel his vendor to redeem and secure to him possession of the five cents. But all that need not deter title to the five cents passing to the vendee. It must be noted that the vendor does not purport, by his deed, to place the vendee in possession of the entire property. The vendor says in the document that he has left the property conveyed for enjoyment by the vendee.

Coming to the schedule which in this case has to govern the determination of the question as to the property intended to be conveyed, of the four boundaries as already pointed out the northern boundary is uncertain and not specific. The northern boundary is referred to as "land retained by me (*கையிருப்பு நிலம்*) and the well." The absence of any reference to the northern boundary land as property

1. (1915) A.C. 900.

in the possession of the usufructuary mortgagees or property which the vendor had mortgaged, is a matter of considerable significance. The vendor has not made the property mortgaged specifically the northern boundary of the property conveyed. It is nobody's case that, between the property conveyed under Exhibit B-1 and the property othied under Exhibit A-1, there was any strip of land retained by the vendor. Even if more than 25 cents had been conveyed under Exhibit B-1, the northern boundary can still be land retained by the vendor. There is no evidence on record—and no point made even in argument that the reference to the well in the northern boundary has any significance with reference to the question at issue. Its location has not been brought out in the record and so has to be ignored. We have it that, while the western, eastern and southern boundaries are definite and certain, the northern boundary is uncertain. With the northern boundary as it stands, the land conveyed under Exhibit B-1 by boundaries can be 15 cents or 50 cents. So for determining the property conveyed, of the three descriptions, manifestly the description by boundaries by itself is inexact and not helpful. The description by area taken with the boundaries, and location of the part in the south of the field, is certain and, definite. In the extreme south the vendee is entitled to 25 cents in the survey number in question. One has only to measure out 25 cents at the southern extremity. The boundaries specified give a general description of the property and are not helpful in limiting it in the north. But, with the extent specified, the property can be localised on the ground with certainty and without any difficulty. If the property conveyed is sufficiently defined by a general description, say by boundaries and it is clearly identifiable therefrom no special description is required and if employed may be useless. But, where the general description indicates, as in this case, more than one possibility and the special description indicates which of the possibilities is meant, the special description restricts the general one and makes it specific. Where the description is general and also special, those parcels of land will pass which satisfy both the descriptions. Bacom in his Law Tracts, rule 13, lays down :

> "But if I have some land wherein all these demonstrations are true and some wherein part of them are true and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true."

In this case if the vendee gets 25 cents in the south, then every part of the description, description by boundaries, description by direction and description by extent, will be satisfied. The property conveyed will be true to boundaries and true to extent. If the contention for the plaintiffs is accepted, then the property conveyed will not be true to extent. The assumption that the vendor intended to convey only property not usufructuarily mortgaged is merely a supposition. When effect could be given to the deed to its fullest extent, I see no reason to limit the conveyance by relying upon a supposition. As pointed in *Hussonally* v. *Tribhowandas*[1], the presumption is that, in fixing the price, regard was had on both sides to the quantity which both supposed the estate to consist of. Of course, there may be considerations which may rebut or weaken the presumption. Here the property was purchased admittedly for putting up a cinema theatre and the vendor and vendee must have had some regard to the extent of land to be conveyed. The deed indicates that no thought had been given to the usufructuary mortgage, when it was executed, If the intention was to exclude property subject to the usufructuary mortgage, describing the boundaries the executant could well have referred to the usufructuary mortgage and the possession by the usufructuary mortgagees of the land in the north. The absence of any such reference is indicative of the fact that the usufructuary mortgage was not the determining factor with reference to the conveyance. There is also this fact that the usufructuary mortgage being by a registered instrument, it can be presumed that the vendee had knowledge of the subsistence of the usufructuary mortgage over an extent of 90 cents in the survey field in question.

The plaintiffs are purchasers of 90 cents six years after the purchase by the defendant. May be that the plaintiffs have redeemed the entire 90 cents even though

1. A.I.R. 1921 P.C. 40.

title in respect of five cents had passed to the defendant. By the became co-owners of the equity of redemption along with the de mortgagors who have redeemed the usufructuary mortgage, the claim contribution from the defendant and contend, if they had five cents, that their possession cannot be disturbed till the con The defendant may have his remedy against his vendor on the encumbrance. One thing is clear: the plaintiffs have title only 85 cents in the survey field which their vendor was entitled to afte under Exhibit B-1. The defendant is entitled to the 25 cents in th purchased under Exhibit B-1. The plaintiff, therefore, cannot ha prayed for or a permanent injunction against the defendant on the l to 90 cents in the Survey field in question. The suit as framed is n the result, the decrees and judgments of the Courts below are set a dismissed, leaving the parties to seek appropriate relief, in acco rights indicated, in other proceedings. The second appeal is allow will bear their respective costs throughout.

V.M.K.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MA

PRESENT:—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE I MR. JUSTICE B. S. SOMASUNDARAM.

In the matter of document dated 14th August, 1963 enter H.B. Boja Gounder and H.B. Devaraj regarding the duty chargeabl red under section 57 of the Stamp Act, 1899.

The Chief Controlling Revenue Authority, Board of Revenue, Madras-5.

v.

H.B. Devaraj, Advocate, No. 7 Mount Road, Coonoor

Stamp Act (II of 1899), schedule 1, Article 45—Interpretation—Instrume Assessment—Standing crops, if should be separately valued for stamp

On the question whether under Article 45 of schedule 1 to th Act, 1899, the standing crops could be separately valued in asses ment of partition of assessed lands for stamp duty, *held* that, it co because the expression "land" carries with it all the fixtures th plants, crops and the like.

Case referred to the High Court by the Chief Controlling Reve Board of Revenue, Madras-5 under section 57 of the Indian Stamp matter of Instrument dated 14th August, 1963 entered into betw Gounder and H. B. Devaraj regarding the duty chargeable on the on his file on the following question of law:—

"Whether Article 45 of schedule I to the Indian Stamp Act, 18 standing crops should be separately valued in assessing the Instrum of assessed lands for stamp duty."

The Additional Government Pleader and *K. Kumaraswamy* Government Pleader, for Petitioner.

N. Suryanarayana for *A. K. Sreeraman* and *A. S. Kailasam*, for Re

The Judgment of the Court was delivered by

Veeraswami, C.J.:—The question referred to us under section 57 Stamp Act, 1899 is

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* Ref. Case No. 3 of 1966. 3rd N

"Whether Article 45 of Schedule I to the Indian Stamp Act, 1899 requires that standing crops should be separately valued in assessing the instrument of partition of assessed lands for stamp duty."

The facts are extremely simple. The respondent and his father effected a partition of their landed properties on 14th August, 1963. The document was stamped with Rs. 13-50. At the time of its registration objection was taken to the proper stamp duty. The executants of the document were required to assess also the value of the standing tea crops on the land and additional duty to be paid thereon.

There is no dispute that duty chargeable in case of a partition instrument under Article 45 is the same duty as a bond and the amount of duty is quantified with reference to the amount of the value of the separated share or shares of the property. There is a proviso to this Article which provides the mode of quantifying the duty if the property divided is land held on Revenue settlement for a period not exceeding thirty years and paying the full assessment. In that case the charge will be calculated on the value calculated at not more than twenty-five times the annual revenue charged on the land.

The question referred to us itself regards the property, the subject-matter of partition, as "assessed lands". The simple question, therefore, is whether the land in the context of partition and of Article 45, includes standing crops. We have not the slightest doubt that it does. The expression "land" carries with it all the fixtures thereto like trees, plants, crops and the like. We are not on the question whether the property is to be regarded as tea estate to be valued as such.

We answer the question against the Revenue with costs. Counsel's fee Rs. 250.

V.M.K. — *Answered accordingly.*

[FULL BENCH].

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE M. NATESAN AND MR. JUSTICE B. S. SOMASUNDARAM.

(In the matter of document dated 22nd June, 1964 entered into between S.M. Abdul Jammal and Messrs. Lakshmi Company, a partnership-firm represented by its Partner Gavra Devi, referring under section 57 of the Indian Stamp Act of 1891, the questions whether (1) cost of repairs, additions and improvements would fall under "premium" or "money advanced" and (2) whether the document dated 22nd June, 1964 is chargeable to stamp duty under Article 35 (*c*) of Schedule I to the Stamp Act in addition to the duty paid under Article 35 (*a*) (iv) of Schedule I of the Indian Stamp Act.)

The Chief Controlling Revenue Authority, Board of Revenue, Madras-5. .. *Referring Authority**

v.

S.M. Abdul Jammal and another .. *Respondents.*

Stamp Act (XX of 1899), *Article* 35 (c), *Schedule* 1—*Scope—Lease deed—Lessee undertaking to effect repairs and additions and improvements, but subject to a certain limit in value—Terms contrary to clauses* (f), (h) *and* (m) *of the Transfer of Property Act—Cost of the repairs etc., if fall within "premium" in Article* 35 (c).

Notwithstanding the law as indicated in clause (*f*) of section 108 of the Transfer of Property Act that the lessor should effect the repairs, in the instant case, the lessee should effect them, but subject to the limit in value mentioned in the deed. Likewise, whereas under clause (*h*) the lessee at the time of the determination of the lease is entitled to remove such additions or improvements he has effected to the building, under clauses 7 and 8 of the lease deed, the lessor is entitled to appropriate, but the limit on that matter in favour of the lessee is rupees two lakhs. That is the reason why the two clauses speak of the obligation of the lessee that he 'shall' effect the repairs and additions and improvements but at a cost not less than rupees two lakhs. Therefore, it has to be held that far from these two clauses

* Ref. Case No. 19 of 1965. — 3rd November, 1969.

providing for payment of a premium, the two clauses, contrary to the statutory right and obligations, make an adjustment of such rights and obligations, but subject to certain limits. Therefore, clause (c) of Article 35 of the Stamp Act is not applicable.

Case referred to the High Court by the Chief Controlling Revenue Authority Madras, under section 57 of the Indian Stamp Act 1899 in the matter of Instrument dated 22nd June, 1964 entered into between S.M. Abdul Jammal and Messrs. Lakshmi Company, a partnership firm, represented by its Partner Mrs. Gavra Devi, for its opinion on the following question law, namely,

" Whether the cost of the repairs additions and improvements to be effected on the premises by the lessees would fall within "premium" or for "money advanced in addition to rent reserved" referred to in Article 35 (c) of Schedule I of the Stamp Act and whether the document dated 22nd June, 1964 is chargeable to stamp duty under Article 35 (c) of Schedule I to the Stamp Act in addition to the duty paid under Article 35 (a) (iv) of Schedule I of the Indian Stamp Act."

G. Ramaswami, Additional Government Pleader, for Referring Officer.

C. Chinnaswami, *Amicus Curiae*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, C.J.:—This is a reference under section 57 of the Indian Stamp Act, 1899, the question being:

" Whether the cost of the repairs, additions and improvements to be effected on the premises by the lessees would fall 'within premium or for money advanced' in addition to rent reserved."

One Abdul Jammal the first respondent, who is the owner of premises No. 22, Errabalu Chetty Street, George Town, Madras, entered into an agreement of lease with the second respondent in respect of a major portion of the premises on a monthly rent of Rs. 5,000. The lease is dated 22nd June, 1964 and was, in the first instance, for a period of twenty years with an option to renew it for a further period of seven years. Clauses 7 and 8, which in effect give rise to this reference read:

" Clause 7. The lessees shall effect the repairs and make additions and improvements at their own cost, at a cost not less than rupees two lakhs, such improvements and additions shall also include construction of a building in the vacant plot of land in front of the main building including electric installations and the lessor shall sign all applications which are necessary to be made to the Corporation of Madras for effecting the said repairs, improvements and construction.

Clause 8. The improvements and additions so made and effected shall belong to the lessor and form an accretion to the demised premises."

The Revenue at the lower stages was of opinion that these two clauses reserved a premium and it should be subjected to additional duty. Article 35 to the Stamp Act, as amended in Madras, by clause (a) sub-clause (*iv*) provides that where the lease purports to be for a period of ten years but not exceeding twenty years, the same duty as a conveyance for a consideration equal to twice the amount of value of the average annual rent reserved should be paid. By clause (c) it is provided that where the lease is granted for a fine or premium, or for money advanced in addition to rent reserved, the document will be chargeable with duty as a conveyance for a consideration equal to the amount or value of such fine or premium. This will be in addition to the duty which would be payable under Article 35 (a) (iv). In view of the Revenue below the stage of the Board of Revenue the document attracted charge under both the clauses. That is how the reference has been made before us.

The contention for the Revenue is that the two clauses we have extracted provided for an obligation on the part of the lessees and correspondingly a right in the lessor to have repairs, additions and improvements made at a cost not less than rupees two lakhs and that this stipulation amounted to a premium. It seems to us that the answer to the reference really turns on the true effect of the two clauses as

to whether they stipulated a premium in consideration of the granting of the lease, or constituted but contractual stipulations contrary to the normal rights and obligations as between a lessor and lessee provided for by section 108 of the Transfer of Property Act, especially in relation to effecting of repairs and improvements or additions being put up.

There is a definition of a lease in the Stamp Act which, however, does not assistant us in the present instance. Section 105 of the Transfer of Property Act defines a lease as one of immovable property in which there is a transfer of a right to enjoy such property, that it is made for a certain term, express or implied, and in consideration,

> "of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee who accepts the transfer on such terms,"

The price paid or promised, or money, a share of crops, service or any other thing of value to be rendered periodically or on specified occasions would both form part of the consideration for the lease, but the distinction between a premium and a rent, in the context, lies in the fact that premium is one paid in consideration of the conveyance implied in the lease and is quantified in lump, whether it is paid outright or by instalments over a period or promised to be paid at a certain time but, a rent, while it is also in consideration of a lease, is in lieu of the enjoyment which the lessee has and particularly as consideration therefor. The further feature of rent is, it is payable as and when it accrues unlike a premium the liability for which arises at the time the contract is entered into. This Court in a few cases, which *V.C. & D. Company* v. *I.G. of Registration*[1], followed, has held that the price paid or promised should be in terms of money in contradistinction with a share of crops, service or any other thing of value to be rendered. But, for purposes of answering the question under reference, we do not think it necessary to decide that question.

As we mentioned earlier, the duty chargeable in this case will entirely depend on the construction we place on the two clauses above extracted. As we read these clauses along with the rest of the terms of the document, we are inclined to think that their effect is not to stipulate for a premium, that is to say, in the sense of a price paid or promised in consideration of the execution of the contract of lease. In our view they appear to be provisions contracting out of the normal rights and obligations provided in section 108. Under clause (*f*) of that section, the obligation to effect repairs is on the lessor. If the repairs which he is bound to make to the property have not been made within a reasonable time after notice by the lessee, the latter has been given the liberty to effect the repairs and deduct the expenses from the rent. Under clause (*h*) the lessee has, even after the termination of the lease, a right to remove at any time whilst he is in possession of the property leased but not afterwards all things which he had attached to the earth subject of course to the condition that he left the property in the same state in which he received it. The obligation of the lessee to restore the premises in as good a condition as it was at the time when he was put in possession has also been reiterated in clause (*m*) of section 108. The two clauses we have referred to in the lease deed undoubtedly provide to the contrary but subject to limits. In the nature of things therefore, the imperative "shall" is called for in the terms, that is to say, notwithstanding the law as indicated in the Transfer of Property Act that the lessor should effect the repairs in the instant case, the lessee should effect them, but subject to the limit in value mentioned in the deed. Likewise, whereas the lessee at the time of the determination of the lease is entitled to remove such additions or improvements he has effected to the building, under the two clauses in the deed, the lessor is entitled to appropriate, but the limit on that matter in favour of the lessee is rupees two lakhs. That is the reason why the two clauses speak of the obligation of the lessee that he "shall" effect the repairs and additions and improvements but at a cost not less than rupees two lakhs. In our view, far from these two clauses providing for payment of a

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1. (1966) 1 An.W.R. 307 : A.I.R. 1967 A. P. 90.

premium, they in the sense we have mentioned, enter into a contract contrary to the statutory rights and obligations we have mentioned if and when they arise, and, the two clauses make an adjustment of such rights and obligations, but subject to certain limits.

On that view, it will follow that clause (*c*) of Article 35 of the Stamp Act is not applicable. We answer the question against the Revenue with costs. Counsel's fee Rs. 250.

V.M.K. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Thailammal and others .. *Appellants.**

v.

Angammal .. *Respondent.*

Specific Relief Act (I of 1877), section 15—Specific performance of part of a contract—Specific performance of sale of a part of the property agreed to be sold—When granted.

Section 15 of the Specific Relief Act enables a purchaser to claim the equitable relief of specific performance of a part of a contract under certain circumstances. The purchaser, if he is willing, may accept a part of the property contracted on payment of the full stipulated price for the entire property. The option is given to the purchaser to claim such a relief or claim damages, if he is entitled.

In a suit for specific performance of the contract of sale there is nothing in law to limit the exercise of the option to accept a part to the trial stage alone. In fact one of the conditions for granting the relief is that the vendor is unable to perform the whole of his part of the contract. This condition, on which a dispute might arise, cannot be determined finally unless the case goes through the trial and appellate stages. Hence there is no reason to limit the exercise of the option by the plaintiff seeking the relief of specific performance, to any particular stage of the legal proceedings and it can be exercised at any time before the proceedings are finally decided which may be even in a Court of Second Appeal.

Narayanamurthy v. *Madhavayya*, (1947) 60 L.W. 680 : (1947) 2 M.L.J. 366, Ref. and Expl.

Parthasarathy v. *Kondiah*, I.L.R. (1965) 1 Mad. 464: (1966) 1 M.L.J. 90, Foll.

A Court can grant the equitable relief under section 15 at any stage if the plaintiff satisfies the conditions laid down under the section.

Appeal against the decree of the District Court, Salem in Appeal Suit Nos. 407 and 369 of 1963 respectively preferred against the decree of the Subordinate Judge of Salem in Original Suit No. 169 of 1961.

Petition praying that for the reasons set forth in the affidavit filed therewith the High Court will be pleased to permit that the appellant in Second Appeal No. 1216 of 1965 to withdraw her appeal.

R. Kesava Ayyangar for *R. Shanmugham*, for Appellants.

K. Venkataswami and *S. Jagadeesan*, for Respondent.

The Court delivered the following

JUDGMENT :—These second appeals arise out of a suit for specific performance of an agreement to sell immovable property, and of these, Second Appeal No. 453 of 1965 by the defendants is directed against the decision of the Courts below granting the plaintiff a decree under section 15 of the Specific Relief Act (I of 1877), the defendants having been directed to execute a sale deed in favour of the plaintiff in respect of a half share in the suit property for the full consideration of Rs. 5,450 covenanted for sale of the entirety of the property. If these second appeals have to be disposed of by reference only to the grounds of second appeal, they may be dismissed straight-

* S.A. Nos. 453 and 1216 of 1965. .. 4th November, 1967.

away as the substantial grounds of appeal do not raise any question of law. Mr. R. Kesava Ayangar, learned senior Counsel appearing for the appellants, has raised a question of law at the time of arguments, and the excuse for entertaining it at this stage is that to an extent it is rested on the fact of presentation by the plaintiff of Second Appeal No. 1216 of 1965 from the same decree. After the second appeals had become part-heard Counsel appearing for the appellants in Second Appeal No. 1216 of 1965 has applied for leave to withdraw that second appeal and also filed petition Civil Miscellaneous Petition No. 13825 of 1967 with an affidavit in support thereof praying for withdrawal of the second appeal. I shall be adverting to this aspect of the matter later.

The property, the subject of these proceedings was owned as joint family property by one Marimuthu Mudali and his son Vinayatha Mudali. Marimuthu Mudali died in 1950 leaving himself surviving his widow, the first defendant in the suit, and his son, the said Vinayatha Mudali. On 6th April, 1960, Vinayatha Mudali entered into the agreement Exhibit A-1 with the plaintiff for the sale to him of the suit property for a consideration of Rs. 5,450 and received in part payment of the consideration a sum of Rs. 2,000. The receipt of Rs. 2,000 is evidenced by a promissory note Exhibit A-2, dated 6th April, 1960. Vinayatha Mudali died on 25th May, 1960, and defendants 2 and 3 are persons who claim to have purchased the entirety of the suit property under a sale deed Exhibit B-2, dated 17th November, 1961 for a consideration of Rs. 9,000 from the first defendant. The suit by the plaintiff for specific performance was filed on 11th December, 1961. It is the case of the plaintiff that the first defendant is the only heir of Vinayatha Mudali, and that when required by the plaintiff to receive the balance of purchase price and execute a sale deed, the first defendant was evading the execution of a sale deed and eventually brought out a sham and nominal sale deed in favour of defendants 2 and 3. Notices have been exchanged between the parties. The defendants would deny the truth, genuineness and validity of the agreement for sale relied upon by the plaintiff, and it is their further plea that the deceased Vinayatha Mudali was entitled only to a half share in the property. In the plaint *inter alia* it was averred that the plea that the deceased Vinayatha Mudali was entitled only to a half share was false, and even if it was so, the plaintiff would be entitled to specific performance in respect of the right, title and share of Vinayatha Mudali. It was specifically stated in the plaint that the plaintiff was always ready and willing to perform her part of the contract, and that she was willing to deposit the balance of purchase price and also the requisite money for the purchase of stamp papers and registration. Of the issues framed for trial, the following issues indicate the scope and extent of the defence.

> " (*a*) Whether the suit agreement is true, valid, supported by consideration and enforceable ?
>
> (*b*) Whether the deceased Vinayatha Mudali was a major on the date of the agreement and competent to execute the agreement ?
>
> (*c*) Whether the said Vinayatha Mudali was owner of the entire properties mentioned in the agreement and whether the first defendant and Angammal (mothere-in-law of the first defendant) had no hare in the suit properties ?
>
> (*d*) Whether in any event, defendants 2 and 3 are *bona fide* purchasers for value without notice of the agreement ?"

The question of minority of Vinayatha Mudali when he executed the agreement was not pressed at the trial, but there was a vehement attack on the truth and genuineness of the agreement Exhibit A-1 and of part payment of the price as per Exhibit A-2. On an exhaustive consideration of the evidence, the trial Court found that the suit agreement was true, valid, supported by consideration and enforceable. It found from the evidence of P.Ws. 1 and 2 and Exhibits A-1, A-2 and A-12 to A-14 that Vinayatha Mudali executed the agreement Exhibit A-1 in favour of the plaintiff and received a sum of Rs. 2,000 on 6th April, 1960. As regards the *bona fides* of defendants 2 and 3, it was found that the defendants did not act in good faith or make necessary enquiries before they purchased the property. Exhibit

B-2, the sale deed in favour of defendants 2 and 3, shows that only a sum of Rs. 1,500 was paid under the agreement as advance. The document relied upon as the anterior agreement for sale (certified copy Exhibit A-19, dated 16th November, 1961) mentions the payment of a sum of Rs. 3,000 as advance, the sale deed to be executed within three months. But the sale deed came to be executed the very next day, 17th November, 1961, While the defendants' case was that a sum of Rs. 3,000 was paid as advance, their evidence shows only a payment of Rs. 1,600. The balance of consideration for the sale was not paid immediately on the date of the sale; but defendants 2 and 3 executed a promissory note Exhibit B-3 for a sum of Rs. 7,500 in favour of the first defendant and her mother-in-law. It was admitted that possession of the property was not delivered on the execution of the sale deed, and that possession was given only after three months on 23rd February, 1962 subsequent to the institution of the suit. The alleged payment of Rs. 7,500 under the sale also, it is seen, is after the suit on 23rd February, 1962. A registered receipt was taken for the payment of consideration before the Registrar on 23rd February, 1962. The trial Court was hesitant to accept even the passing of consideration of Rs. 7,740 as per the receipt Exhibit B-4. The plaintiff had issued notice to the defendants on 27th November, 1961 and defendants 1 to 3 had sent reply notices by 2nd December, 1961. The trial Court noticed that the defendants had filed their written statement before the alleged payment of money under Exhibit B-4, dated 23rd February, 1962. Even assuming that the balance of consideration had been paid to the defendants, the bulk of consideration of Rs. 7,500 had been paid only after the notice of the agreement of sale in favour of the plaintiff, institution of the suit for specific performance and after the filing of the written statement. In the circumstances on a careful analysis of the evidence and probabilities in the case the trial Court holds that defendants 2 and 3 could not be said to be persons who paid consideration in good faith without notice of the agreement for sale in favour of the plaintiff. On the question of title to the properties, the trial Court quite properly holds that the first defendant, the mother of Vinayatha Mudali, became entitled to a half share in the property the other half share only being owned by Vinayatha Mudali. The Court finds that Angammal, the mother-in-law of the first defendant and widow of Marimuthu Mudali's father who died in 1919 had no interest in the properties as pleaded. Examining the question whether the plaintiff was entitled to enforce the agreement for sale of the entire property against defendants 1 to 3, it overruled a plea of the plaintiff that the proposed sale by Vinayatha Mudali was for purposes binding on the family and, therefore, on the first defendant. It was held that the plaintiff was not entitled to enforce the agreement in respect of the entire property, and that the case fell within the scope of section 15 of the Specific Relief Act. It was observed that it was open to the purchaser to get specific performance so far as the half share of Vinayatha Mudali was concerned on payment of the full consideration agreed upon without any abatement from the hands of the legal representative of Vinayatha Mudali, that is, the first defendant. The plaintiff had paid Rs. 2,000 to Vinayatha Mudali himself and specific performance was decreed for his half share in the suit property on payment of the balance of sale consideration and the plaintiff deposited the balance in the trial Court. However she preferred an appeal, Appeal Suit No. 369 of 1963, to the District Court, Salem, and the defendants also preferred an appeal, Appeal, Suit No. 407 of 1963, against the decree directing specific performance. The case for the plaintiff in the appellate Court as well in the trial Court *inter alia* was that the first defendant had agreed to Exhibit A-1 and that, therefore, she was entitled to a sale of the entire property. The plaintiff argued that Vinayatha Mudali, the first defendant and her mother-in-law had agreed to the sale, and that as Vinayatha Mudali was the manager of the family the document was taken from him alone. This explanation was not accepted by the appellate Court. The defendants in their appeal pressed their case that Exhibits A-1 and A-2 were not true documents and that in any event the sale Exhibits B-2 should prevail over Exhibit A-1. On his independent review of the evidence, the learned District Judge confirmed all the findings of the trial Court and in the result dismissed both the

appeals before him. He pointed out that the trial Court had done the right thing in decreeing specific performance in respect of a half share in the suit property on the plaintiff paying the balance of the consideration. The learned District Judge while confirming the decree in favour of the plaintiff referred to the fact that the amount of Rs. 3,450 the balance of consideration was in Court deposit.

Having regard to the character of the findings on the merits of the case, naturally learned Counsel for the appellants could not require this Court in second appeal to review the evidence and take a different view. The findings are one of fact based on relevant and material evidence. Of course for the appellants certain improbabilities as to the truth of the agreement Exhibit A-1 were mentioned. The failure of the plaintiff to refer to this agreement in another suit which had been instituted by defendants 2 and 3 against the plaintiff and her husband was commented upon as improbabilising the existence of the agreement. This aspect has been considered by the Courts below and the explanation submitted for the plaintiff was accepted. Mr. Kesava Ayyangar, learned Counsel for the appellants rests the appeal on the contention that the Courts below erred in law in granting the plaintiff relief under section 15 of the Specific Relief Act. It is contended that under section 15 the plaintiff has to elect to accept conveyance of part of the property on payment of the consideration agreed for the whole relinquishing all claims to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant. It is said that an option is given to the plaintiff to accept part of the property as full performance of the contract, and it is argued that in this case on the trial Court passing a decree granting relief under section 15 of the Act, the plaintiff without accepting it, giving up further prosecution and seeking further enforcement of the agreement, preferred an appeal claiming a decree for conveyance of the entire property. It is said that thereby the plaintiff had declined the option given to her under the section and having elected to stand by her claim for the entirety of the property, she had forfeited all claims to equity for a decree under section 15. The option under section 15, not having been availed of, it is said that section 17 of the Act operated and the Court cannot, therefore, direct specific performance of a part of the contract. Section 17 prohibits a decree for specific performance of a part of contract except in cases coming under sections 14, 15, and 16. Section 14 and section 16 are not applicable to the present case. It is argued for the appellant that even now notwithstanding the failure in the lower appellate Court the plaintiff has come up to this Court in second appeal filing Second Appeal No. 1216 of 1965 and asserting claim for conveyance of the entirety of the property. The argument is that specific performance is an equitable remedy and the plaintiff was bound to elect whether she would be satisfied with the performance in part. But here the plaintiff was seeking further performance based on untenable grounds. In the circumstances it is said that she should be deprived of the equitable relief which has been granted to her by the Courts below. As stated at the outset, the plaintiff to avoid this argument in the course of arguments, sought the permission of this Court to withdraw Second Appeal No. 1216 of 1965. In the affidavit in support of a petition for withdrawal the plaintiff stated that she was content with the decree of the Courts below holding that she was entitled to specific performance of a half share in the suit property, and that she relinquished all her claims to further performance and all right to compensation either for deficiency or for the loss or damage sustained by her. The defendants have filed a counter affidavit urging *inter alia* that there was no alternative prayer even in the plaint. But it is the right and privilege of an appellant whether or not to prosecute his appeal and all that the respondent in such a case could claim is that he must be given his costs. When the appellant chooses not to press the appeal, it has to be dismissed. The question whether the presentation of the second appeal disentitles the plaintiff to relief under section 15, is a different matter.

There can be no two views about the principle for that is the section itself that specific performance of part of a contract cannot be granted under section 15 unless the plaintiff expresses his willingness to pay the consideration stipulated for the entire contract for a portion only of the property. But the question is at what

stage this willingness to accept part of the property on payment stipulated price should be expressed giving up all claims that may b of the default. Mr. Kesava Ayyangar would contend that th sing the option and claiming relief under section 15 is in itself. In the present case though the trial Court had giv plaintiff under section 15, even thereafter she would not rest c prosecute claim for further performance and in fact has come up second appeal pressing her claim for full performance.

Sections 14 to 16 of the Specific Relief Act deal with cases performance of part of a contract may be decreed and these sectio to section 17 which provides that no Court shall direct specific pe of a contract. Sections 14 to 17 together constitute, a complete terms of which relief by way of specific performance of part of a had. The case on hand does not come under section 14 and it that the case comes under section 16. Relief can only be granted Under section 15, the part that could not be performed must be only the purchaser is entitled to enforce this contract specifica however, cannot compel the party to accept part performance wl could not be performed is considerable. The equitable principle u 15 is that specific performance of a contract will not be enforced ag where a material or substantial part of the subject-matter is wa chaser if he is willing may accept a fraction of the property contra of the full stipulated price for the whole of the property. If a willing to accept part performance under section 15, he will be en of the deposit and to sue for damages if entitled. The first part c down that where a party to a contract is unable to perform the wh it and the part which must be left unperformed forms a considerab whole, or does not admit of compensation in money, he is not ent decree for specific performance. The second part of section 15 case is concerned gives an option to the purchaser to claim spec of a part under certain terms. It runs thus:

> " But the Court may, at the suit of the other party, direct the to perform specifically so much of his part of the contract as provided that the plaintiff relinquishes all claim to further perfc right to compensation either for the deficiency or for the loss or d by him through the default of the defendant."

The second part of section 15 gives an option to the purchaser in a vendor is unable to perform the whole of his part of contract and must be left unperformed forms a considerable portion of the whol be a case where the vendor is unable to perform the whole of his part There may be dispute on this question. The purchaser may c vendor has title to the entirety of the property, that he could co of it, and that he is giving only excuses for non-performance of tl contract. When a dispute arises between the parties as to wheth contract may be performed wholly or only in part, the matter has t by Court. The Court has to decide the extent of the part of con vendor can perform. The section itself does not say at what stag election by the purchaser should be exercised. It is conceivable th archy of Courts which we have, the determination may vary from The trial Court may hold that in a particular case the contracting p only a half share. The first appellate Court may take a different that the promissor is entitled in law to a ¾ share or the whole of In a given case it may so happen that the second appellate Court fc finds that the vendor has title only to a party. When section 15 particular position or set of facts for the applicability of the second, it that it is the ultimate assessment of the set of facts that is contem exercise of the option. One can see no reason to limit the exercis at any particular stage of the legal proceedings. Of course, specific

chaser has been cantankerously pursuing a wholly futile claim for the entirety of the share, refuse to grant him the discretionary relief of specific performance. But the exercise of discretion is a matter which has to be decided on a conspectus of all the facts of the case. I can see no reason to limit the exercise of the option to the trial stage, as contended for the appellants. Subject to certain provisions, the first appellate Court in this Country has all the powers as the original Court, and the second appellate Court has powers similar to that of the first appellate Court—*See* sections 107 and 108, Civil Procedure Code.

Learned Counsel for the appellants, in support of his contention, referred to a passage in the judgment of Gentle, C.J., in *Narayanamurthy* v. *Madhavayya*[1], Gentle, C.J., and Horwill, J., constituting the division Bench in that case. The case arose out of a suit for specific performance of a contract for the sale of a land. The agreement for sale was entered into by the first defendant for the sale of an extent of 16 acres and 80 cents of land, and the case of the plaintiff was that the agreement for sale was made by the first defendant as *Kartha* of the Hindu joint family of himself and the second defendant for binding family purposes. It was found that the defendants were separated in status, and that the agreement for sale entered into by the first defendant could not in any way bind the second defendant or his share in the 16 acres and 80 cents of land. The plaintiff claimed specific performance against both the defendants and prayed in the alternative for damages. The trial Court refused the specific performance prayed for and also the exercise of the provisions of section 15. The learned Subordinate Judge gave as reason for declining relief under section 15 that there must be an unconditional request by the plaintiff that he was prepared to take the first defendant's share for the whole consideration without claiming any damages or compensation and the plaintiff in the case wished to file an appeal against the suit. Gentle, C.J., while rejecting the appeal by the plaintiff *inter alia* observed at page 685:

> "There would be violation of the section (section 15) if the plaintiff obtained a decree against the first defendant, pursuant to the section, and thereafter proceeded further by way of appeal to enforce the contract in respect of the remaining portion of the land which belongs to the second defendant. As mentioned previously, the benefit given by section 15 is statutory, and its terms must be fully complied with by the person seeking to invoke it. When, as in the present instance, a person sues for specific performance of an agreement, and it is held that he cannot obtain an order in respect of the whole but only part of the property, the subject of the agreement sought to be enforced, it is at that stage that he must make up his mind what he will do if he considers that the decision of the trial Court, which has held that he is not entitled to specific performance of the whole, is incorrect. He cannot call in aid section 15, and at the same time, proceed, in addition to obtain the remainder of the property or damages, that is not relinquishment of all claims."

It must here be noted that the learned Judge points out that the stage comes in when it is held that the plaintiff cannot obtain an order in respect of the whole but only part of the property. It is not said that this cannot be done at the appellate stage. Having regard to the fact that no case-law is discussed and that the other learned Judge Horwill, J., discusses a number of cases, it cannot be assumed that the learned Chief Justice was ignoring the case-law placed before the Court, permitting the grant of the relief even at the appellate stage. When the reference is to a judicial finding, it can only mean the ultimate judicial finding which has finality in law. The scope of the observations of the learned Chief Justice, particularly in the earlier and later part in the passage above quoted becomes clear when the later observations of the learned Chief Justice at page 686 to the effect in the memorandum of appeal ground No. 20 the plaintiff alleges that the lower Court failed to see that so long as the plaintiff restricted his remedy against the first

1. (1947) 2 M.L.J. 366: (1947) 60 L.W. 680.

defendant to the performance of the contract of sale with respect to ... —
plaintiff was perfectly within his rights in proceeding in appeal against the second defendant with respect to the other questions arising in the case is noticed. The learned Chief Justice points out that this ground of appeal made it manifest that whilst the plaintiff wished to invoke section 15 in the Court below, nevertheless he intended to continue enforcement of performance of the contract or to obtain compensation with respect to its non-performance, and that this ground of appeal was sufficient to make it clear that the plaintiff was not entitled to the benefits of the section. It is clear from the ground that so far as the actual contracting party was concerned, the plaintiff is willing to accept part performance but he wanted to proceed for the remainder against the other party. This clearly went against the scope of section 15. The following observation of the learned Chief Justice in my view, brings out the vitiating feature of the plaintiff's claim in that case which the learned Chief Justice saw;

"He cannot call in aid section 15, and at the same time, proceed, *in addition* to obtain the remainder of the property or damages. (The *emphasis* is mine.)"

The other learned Judge, Horwill, J., examines this question now under consideration *in extenso*. The learned Judge considers the question whether the trial Court ought to have applied section 15, notwithstanding the circumstances that the appellant was not prepared to forego his right of appeal on the question whether the agreement was binding on the second defendant. The learned Judge observes at page 688:

"This section (section 15) can only come into application where a party to a contract is unable to perform the whole of his part of it; and so it is necessary for a Court to determine, before considering whether it should apply section 15, whether the party to the contract is able to perform the whole of his part of the contract or not. It is only on the Court's finding that he cannot perform the whole of his part of the contract, that any question with regard to the application of this section arises."

Referring to the claim by the plaintiff in that case of his intention to prefer an appeal the learned Judge remarks:

"In saying that he intended to appeal, he was not refusing to give the undertaking required by the proviso to section 15, in the event of its being held in appeal that that section applied; the was merely saying that he intended inviting the appellate Court to find that section 15 had no applicability at all. Incidentally, since the whole matter has been re-opened in appeal this Court has the same duty as the trial Court of determining whether the first defendant was able to perform the whole of his contract or not; and if, as we have found, he was not, then of deciding whether this Court should direct the first defendant to perform so much of the contract as it lies in his power to do."

The learned Judge then proceeds to consider several decisions on this aspect of the matter and concludes that the Subordinate Judge in that case could apply section 15 and it was also open to this Court in appeal if so minded to grant the relief to the plaintiff. It is pointed out that the plaintiff cannot, however claim the relief as of right. Since the question is a matter of discretion, the learned Judge held that he was not prepared to say that the lower Court should have granted relief under section 15. The learned Judge pointed out that the decision of the Judicial Committee in *Pramathanath Mitra* v. *Gosthabihari Sen*[1], which was also cited before me by learned Counsel for the appellants, had no bearing on the question because in that case there was no offer by the plaintiff at any time even before their Lordships of the Privy Council to forgo their right to compensation or damages.

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1. 62 M.L.J. 243 : 59 I.A. 47 : (1931) I.L.R. 59 Cal. 1025 (P.C.).

For the appellants it is said that a recent decision of a division Bench of this Court in *Parthasarathy* v. *Venkata Kondia*[1], has read the decision in *Narayanamurthy* v. *Madhavayya*[2], as holding that there should be an unconditional acceptance by the plaintiff of the relief offered under section 15 at the trial or at the earliest opportunity. It is contended that an unconditional acceptance postulated giving up of the right of appeal. I am unable to read the judgment in *Parthasarathy* v. *Venkata Kondiah*[1], as laying down any such proposition. Far from it, a perusal of the judgment that the decision contemplates the exercise of an option at any time before the matter is finally decided which may be even in a Court of second appeal. This decision on Letters Patent Appeal confirmed that of Ramakrishnan, J., in *Parthasarathi* v. *V. Kondiah*[3], granting in appeal relief to the plaintiff under section 15. The agreement for sale of immovable property which was enforced in that case, was executed by the first defendant in that suit; but he had title only to item 1 and had no right to convey item 2 which belonged to his sister. The trial Court thought that it could apply section 14 of the Specific Relief Act having regard to the relative value of the properties and directed a conveyance of item 1 only for a reduced consideration. On appeal by the defendant, Ramakrishnan, J., took, the view that inability to convey item 2 could not be considered to be a small and immaterial deficiency entitling the plaintiff to get a decree for specific performance subject to payment of compensation. This Court was of the view that section 16 would not apply and section 15 was more in point. During the hearing of the appeal, the plaintiff applied in this Court offering to take up conveyance of item 1 for the full contract price giving up his claim for compensation and further performance. The learned Judge granting relief under section 15, observed at page 108;

> " It has been pointed out in several decisions of Courts that the giving up of the relief of compensation could be made by the promiser at any stage in the action."

Reference was made therein to the decision of the Supreme Court in *Kalyanpur Lime Works.* v. *State of Bihar*[4], and that of the Calcutta High Court in *Dwijendra Kumar* v. *Monmohan*[5], The learned Judge distinguished *Pramathanath Mitra* v. *Gosthabihari*[6]; observing that the Privy Council did not consider the question about the stage at which the promise could relinquish his claim, and that the question had been dealt with only in the two decisions above cited. The division Bench in *Parthasarathy* v. *Venkata Kondiah*[1], has affirmed this decision of Ramakrishnan, J., granting relief under section 15 at the appellate stage, referring to the case-law permitting the grant of relief at any time before a suit is finally decided. True, while referring to *Narayanamurthy* v. *Madhavayya*[2], it is observed at page 540.

> " In that case in a contract to convey 16 acres 80 cents of land the vendor was not able to convey the entire extent but only half of that area and when a suit was filed the plaintiff did not relinquish all claim to further performance of the contract and to all rights to compensation either for the deficiency or for the loss or damage sustained by him through the default of the first defendant. But in appeal when it was complained to the learned Judges that the learned Subordinate Judge refused to exercise the provisions of section 15 the learned Judges rejected this contention and agreed with the reasoning given by the trial Judge that it should be an unconditional request by the plaintiff without claiming any damages or compensation or any other relief. But on the other hand the plaintiff represented to the trial Judge that he would file an appeal against the suit."

In referring to the aforesaid decision, it cannot be said that this Court in *Parthasarathy* v. *Venkata Kondiah*[1], was approving the view of the Subordinate Judge in the earlier case. Only the facts of that case were being set out. Venkatadri, J., who delivered the Judgment of the division Bench observes at page 470:

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1. (1966) 1 M.L.J. 90 : I.L.R. (1965) 1 Mad. 464.
2. (1947) 2 M.L.J. 366 : (1947) 60 L.W. 680.
3. A.I.R. 1963 Mad. 106.
4. (1954) S.C.J. 99 : (1954) S.C.R. 958 : (1954) 1 M.L.W. 905 : A.I.R. 1954 S.C. 165.
5. A.I.R. 1957 Cal. 209.
6. (1931) I.L.R. 59 Cal. 1025 (P.C.) : 62 M.L.J. 243.
7. (1966) 1 M.L.J. 90: I.L.R. (1965) 1 Mad. 464 : A.I.R. 1963 Mad. 106.

"In view of the principles laid down in the above decisions, the plaintiff is certainly entitled to relinquish his claim to compensation at the stage of the first appeal."

The decisions relied on certainly include also the decision in *Narayanamurthy* v. *Madhavayya*[1]. If the division Bench of this Court had accepted the view of the Subordinate Judge in *Narayanamurthy* v. *Madhavayya*[1], as contended for the appellants there could have been no affirmance of the decision of Ramakrishnan, J.

It will be useful to refer to some of the earlier cases cited in the decisions above considered in the context of the present contention. In *Poraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty*[2], a contract of sale was entered into by a person on his own behalf and on behalf of certain minors. The contract of sale was found not binding on the minors and the Courts below dismissed the plaintiff's suit for specific performance in its entirety. The Courts were of the view that the contract was one and indivisible and no relief could be granted even against the adults who had entered into the contract. In second appeal in this Court the plaintiff pressed for a decree for the entirety of the property against the two adults, defendants 1 and 4. While finding that no decree could be passed compelling conveyance of the interests of the minors as well as of the adult defendants on the appellant expressing in second appeal his willingness to take a conveyance by the two adult defendants of all their interests in the suit properties for the purchase money agreed upon without abatement or compensation, this Court held that plaintiff was entitled to such a decree. In reversal of the decrees of the Courts below, this Court directed that on payment within three months of the balance of the purchase money by the plaintiff, the two adult defendants in the case the first and fourth defendants should execute a conveyance of their interests in the suit properties. Proceeding it was ruled that as the plaintiff did not agree to the course in the Courts below, the plaintiff should pay the costs of the defendants. This is a direct authority of a division Bench of this Court granting relief to a plaintiff for the first time in second appeal and depriving him of his costs as the plaintiff did not agree in the Courts below to the grant of such relief. This decision of the division Bench has been approved by a Full Bench of this Court in *Baluswami Ayyar* v. *Lakshmana Aiyar*[3], Wallis, C.J., in the Full Bench case explains away the conclusions in *Paraka Subbarami Reddy* v. *Vadlamudi Seshachalam Chetty*[2], the plaintiff asks for a decree against the shares of the first and fourth defendants at least. This we think he cannot have, as meaning that the plaintiff could not have a decree directing defendants 1 and 4 who were parties to the agreement to convey their own interest at a reduced price. The learned Chief Justice points out that as the plaintiff in that case expressed his willingness to pay the full contract price and waive all claims for compensation the learned Judges, at the close of their judgment gave him a decree as regards the shares of the first and fourth defendants.

In *Dinanath Sarma* v. *Gour Nath Sarma*[4], plaintiff sued for specific performance on the footing that he was entitled to a ⅓th share which belonged to the first defendant offering to pay a proportinate part of the consideration. The first Court decreed the suit. The appellate Court reversed the decision, the basis being that inasmuch as section 15 applied to the case the plaintiff would only be entitled is a decree upon the footing that he accepted the ⅓th share of the first defendant in return for payment of whole of the consideration agreed upon and abandoned his claim to further performance and compensation. In second appeal it was contended for the plaintiff that it was not section 15 but section 16 that would apply. This contention was not accepted. It was noticed that the plaintiff, even in the lower Court, finding that the decree in his favour might be reversed, had offered to pay the full consideration in return for a conveyance of the ⅓th share belonging to the first defendant. The lower appellate Court had rejected the offer considering it as a belated one.

1. (1947) 2 M.L.J. 366 : (1947) 60 L.W. 680.
2. (1909) I.L.R. 33 Mad. 359 : 20 M.L.J. 328.
3. (1921) I.L.R. 44 Mad. 605, 614 (F.B.) : 41 M.L.J. 129.
4. A.I.R. 1925 Cal. 434.

The High Court in second appeal granted the plaintiff relief under section 15, observing:

"It appears to me that when a Court is able to discover, as in this case, an equitable relief to which the party is entitled it would be well advised to allow the plaintiff, when the defendant had been so obviously in default to take advantage of any such equitable relief to which he is entitled under the law........"

In *Panchánanda* v. *Rájani Kanta*[1], the plaintiff sought to enforce a contract against the first-defendant in respect of his 1/3rd share of the land in question and not against the minor brothers of the first defendant. The learned District Munsif came to the conclusion that there was no concluded agreement for enforcement. On appeal the learned Subordinate Judge granted a decree for specific performance of the first defendant's 1/3rd share in return for the payment of 1/3rd purchase price. The question seriously considered in the High Court was as to the nature and extent of the relief the plaintiff was entitled to. After discussing the true scope of sections 14 to 17 of the Specific Relief Act and following the decision of this Court in *Baluswami Aiyar* v. *Lakshmana Aiyar*[2], it was held that the case fell under section 15, and that the Court had no other course but to allow the appeal and set aside so much of the judgment of the learned Subordinate Judge as it directed payment only 1/3rd of the price. The High Court observed that if the plaintiff desired to have the first defendant's 1/3rd share in the land in question conveyed to him, he must be prepared to pay the whole of the consideration less what had been paid already. It was pointed out that if on the other hand the plaintiff was content to get relief by way of compensation from defendant 1 for the undoubted breach of the contract, he would be entitled to obtain monetary compensation for the loss he had sustained. In the circumstances the Court granted time to the plaintiff to elect observing:

"We propose to give the plaintiff an opportunity to make up his mind with regard to the course which he desires to adopt and for that purpose we defer making a final order and allow the plaintiff 14 days' time in which to decide which of the two courses. I have indicated he would prefer to follow."

In that case the plaintiff later informed the Court that he did not wish to purchase a 1/3rd of the property for the full consideration. A decree was, therefore, granted for return to the plaintiff of the advance he had paid. This illustrates the extent of the indulgence which the Courts have shown even at the second appellate stage to grant equitable relief when there has been deliberate breach of the contract by the defendant.

In *Waryam Singh* v. *Gopi Chand*[3], the plaintiffs who claimed specific performance urged in the trial Court that the defendants who had agreed to sell 200 Kanals of land in certain specified numbers having proved to be owners of 2/3rd of the land, must be directed to make good the deficiency from other land belonging to them in the village. This contention was not pressed in the High Court. But it was claimed in the High Court for the plaintiffs that there was a case for the application of section 15. For the defendants it was argued that the plaintiffs could not have the benefit of this provision, as they did not make a prayer in that regard in the plaint or during the trial in the Courts below. But in fact the plaintiffs had made an application at the time of arguments in the trial Court. Be that as it may; repelling the arguments of Counsel the Court observed:

"I cannot find anything in section 15 of the Specific Relief Act, or any other provision of the law, limiting action under section 15 to any particular stage of the preceedings. It seems to me that it is open to the plaintiff to relinquish his claim to any part of the property in suit on the conditions specified in section 15, at any time before the suit is finally decided by the Court of Appeal."

The Court held that there were no equities in favour of the defendants in that case that woud justify the refusal of the equitable relief under section 15 in favour of the plaintiffs and granted the plaintiffs the relief under section 15.

1. A.I.R. 1931 Cal. 463, 467. 41 M.L.J. 129.
2. (1921) I.L.R. 44 Mad. 605, 614: (F.B.)
3. (1929) I.L.R. 11 Lah. 69, 75.

This decision was approved by the Supreme Court in *Kalyanpur Lime Works* v. *State of Bihar*[1]. In that case the trial Court had granted specific performance of a contract for lease to commence from 1st of April, 1948. The original contract for lease was for a period of 20 years, the lease to take effect from 1st April, 1934. The State of Bihar which had entered into the contract, was not in a position to grant the lease as originally contracted. The High Court reversed the decree of the lower Court, as in effect the agreement between the parties was reconstructed by the decree. At the time of hearing of the appeal before the High Court, relief under section 15 was prayed for. But that was not granted in the view that the plaintiffs had not relinquished all further claims and were not ready and willing to perform their part of the contract and were asking for more than they were entitled to. The Supreme Court referring to the application of the plaintiffs in the appellate Court pointed out that there was no doubt whatever that the plaintiffs had offered to relinquish all claims to further performance and compensation and observed:

> " The plaintiff's learned Counsel has asked for that relief in the course of his arguments and he has made it clear that he insists on no further performance, nor does he claim any compensation for any period prior to the execution of the leases. Relinquishment of the claim to further performance can be make at any stage of the litigation. See *Waryam Singh* v. *Gopi Chand*[2],. We think, therefore, that subject to what we are going to say on the last point, the plaintiff can claim relief under section 15 of the Specific Relief Act."

After this decision of the Supreme Court categorically laying down that the plaintiff could claim relief under section 15 at any stage of the litigation, little is left for forensic controversy. Even if the observation of Gentle, C.J. in *Narayanamurthy* v. *Madhavayya*[3], could be considered as laying down that the option must be exercised at the stage of the trial itself, after a declaration of the law by the Supreme Court as above stated, there is no room for further argument. The decided cases referred to above show that the relief had been granted even at the second appellate stage for the first time. The decisions are uniform in this regard. Reference may also be made to the decision in *Dwijendra Kumar* v. *Monmohan*[4], In that case the Courts below granted the plaintiff a decree for specific performance of a contract of lease in respect of 3/4th of the suit property at the full stipulated rental without any abatement either in respect of rent or the salami money acting under section 15. It was argued for the defendant that specific performance ought not to have been decreed at all. In second appeal while holding that the plaintiff would be entitled to a decree for specific performance and that he had accepted the decree granted by the Courts below, it was observed:

> " Even if the necessary relinquishment be not inferable from the above circumstances the plaintiff respondent is in no worse position, as his learned Counsel has categorically and unequivocally stated before me that his client is prepared to relinquish his claim to further performance and compensation, as required by the provision in section 15. This is clearly sufficient, as relinquishment for purposes of the said section can be made at any stage of the litigation (vide *Kalyanpur Lime Works* v. *State of Bihar*[1], approving *Waryam Singh* v. *Gopi Chand*[2]."

In the present case pursuant to the decree of the trial Court the plaintiff had deposited the balance of the consideration. No doubt she has been agitating her right to a conveyance of the entirety of the property. But that does not mean that if she is entitled only to relief under section 15, she would still persist on further performance of the contract or claim damages or compensation. The option can be exercised at any stage of the litigation before a finality has been reached. Of course the relief is discretionary and the Court may in a given cases refuse the relief

1. (1954) S.C.J. 99 : (1954) 1 M.L.J. 305 : A.I.R. 1954 S.C. 165, 170.
2. (1929) I.L.R. 11 Lah. 69, 75.
3. (1947) 2 M.L.J. 366 : (1947) 60 L.W. 680 685, 688.
4. A.I.R. 1957 Cal. 209, 210.

at a late stage if the equities of the particular case justify such a course. The Courts below have concurrently held that the plaintiff was entitled to relief under section 15 and granted her a decree accordingly. No controversy was raised in the lower appellate Court as presented now. The plaintiff cannot be said to have refused acceptance of the decree granted if that is all she would be entitled to in law. I can see nothing in her conduct in regard to the litigation that necessarily results in her forfeiting the discretionary decree already granted. She has chosen to exercise her option, at any rate in this Court, withdrawing the second appeal she filed claiming to be entitled to a conveyance of the entirety of the property. A distinction must be noticed between the case of a plaintiff who notwithstanding a decree under section 15 claims that the promiser could in fact convey more, and a case of not relinquishing further performance or claim for compensation while accepting partial performance in the view that the promisor could not perform the contract fully. Agitating *bona fide* in the very suit for specific performance that the contract could be performed in fully by the promisor in default, is quite a different thing from non-waiver of the claim to further performance and compensation while accepting relief under section 15 when it is found that only partial performance could be had. Section 15 provides primarily against the contingency of a plaintiff accepting part performance of a contract for the full consideration and starting a fresh litigation for compensation and damages for the deficiency or seeking to enforce performance against others. It compels this to relinquish all further claims if he would have relief under section 15. The question of a promisee exercising option arises only where the situation gets crystalized finally that he cannot have performance of a contract as a whole. In the present case Counsel for the plaintiff has expressly stated before me that in terms of section 15 his client waives all claims to further performance and all rights to compensation either for the deficiency or for the loss or damages sustained by her through the default of the defendants. That apart the plaintiff has in the affidavit in support of her application to withdraw the second appeal specifically relinquished all further performance and offered to abide by the conditions of section 15 for securing the relief thereunder.

Learned Counsel for the appellants submits that the grant of the relief for specific performance is discretionary and that the plaintiff in this Court is not exercising its discretion for the first time. The Courts below have exercised their discretion and it cannot be said that their exercise of discretion is arbitrary or unwarranted in the circumstances of the case. Every conceivable plea has been taken against the plaintiff. The very contract and receipt of consideration in part was denied. There is no unreasonable delay in filing the suit for specific performance. The original contracting party died shortly after the contract and defendants 2 and 3 entered on the scene with full knowledge of the contract in favour of the plaintiff. Their alleged payment of the major part of the consideration is after the institution of the suit. I see no reason whatsoever for disentitling the plaintiff to the relief under section 15 which was granted by the Court below.

In the result Second Appeal No. 453 of 1965 is dismissed with costs. Second Appeal No. 1216 of 1965 which is not pressed and withdrawn is also dismissed with costs. No leave.

R.M. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. RAMAPRASADA RAO.

T. K. P. R. Ramanatha Chettiar & Bros., Chandra Lorry Service, Vellore ... *Applicant**

v.

Commissioner Of Income-Tax, Madras ... *Respondent.*

Income-tax Act, 1922 (*Central Act XI of* 1922), *section* 26-*A*. *Registration of firm—Assessee-firm plying own lorries with permits standing in the names of original owners—Partnership, whether illegal.*

Motor Vehicles Act, 1939 (*Central Act IV of* 1939), *section* 42.

The assessee-firm plied lorries which it owned with permits not transferred to its name but continuing in the names of the original owners. The Tribunal refused renewal of registration of the assessee-firm on the ground that the assessee-firm engaged itself in an unlawful activity in operating the lorries without valid permits which was prohibited by section 42 of the Motor Vehicles Act, 1939. On a reference to the High Court,

Held, that though the assessee-firm was the owner of lorries and operating them the partnership cannot be regarded as illegal merely because the permits in regard to them stood in the names of original owners, and, therefore, the assessee-firm was entitled to registration.

Reference under section 66 (1) of the Indian Income-tax Act, 1922.

Nos. 768 of 1964-65 and 769 of 1964-65 (I. T. A. No. 9536 of 1962-63), (Assessment year 1960-61) and I. T. A. No. 5618 of 1963-64 (Assement year 1962-63 respectively) on its file for decision in the following question of law viz.,

(*i*) Whether on the facts and in the circum stances of the case, the refusal of registration under section 26-A of the Indian Income-Tax Act 1922 to the assessee firm for the assessment year 1960-61 is justified in law?

(*ii*) Whether on the facts and in the circumstances of the case, the refusal of registration under section 185 (1) (a) of the Income-Tax Act, 1961 to the assessee firm for the assessment year 1962-63 is justified in law.

K. Srinivasan, Meenakshisundaram and *K. S. Rajappa*, for Applicant.

V. Balasubramanyan and *J. Jayaraman*, Special Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—The two references pertain to the assessment years 1960-61 and 1962-63. The Tribunal has found that the assessee-firm plied three lorries during the first year and two lorries during the second which they owned but with their permits not transferred to them but continuing to stand in the names of the original owners. Upon those facts, the Tribunal was of opinion, agreeing with the Commissioner of Income-tax, that inasmuch as the firm operated the lorries without valid permits which was prohibited by section 42 of the Motor Vehicles Act, the firm engaged itself in an unlawful activity, namely, the running of the lorries without a valid permit. On that view the registration of the firm which was granted by the Income-tax Officer and subsequently renewed by him stood cancelled. The common question in this reference is :

"Whether on the facts and in the circumstances of the case, the refusal of renewal of registration under section 26-A of the Income-tax Act, 1922 to the assessee-firm for the assessment years, 1960-61 and 1962-63 is justified in law?"

*T.C. Nos. 99 and 100 of 1965 12th February, 1969.

Our attention has been invited to an unreported judgment of the Supreme Court in Civil Appeal No. 1453 of 1966 and it is contended that in view of it, the Tribunal's order can no longer be sustained. In that case, which went up to the Supreme Court, the view taken by this High Court in *Viswanathan* v. *Shanmugham*[1] was that a *benamidar* of certain motor vehicles, representing himself to be the owner, falsely obtained the permits in his name, and allowed the true owner, who had no permit, to conduct the actual business and this was a flagrant violation of the basic requirements of the Motor Vehicles Act and of its scheme. The Supreme Court did not accept that view and considered that *Varadarajulu Naidu* v. *Thavasi Nadar*[2] was wrongly decided. The decision of the Andhra High Court in *Chavali Venkataswami* v. *Chavali Kotayya*[3] which had taken a view similar to the one in *Viswanathan* v. *Shanmugham*[1] was also dissented from. The Supreme Court in doing so observed:

"The learned Counsel for the respondent says that any rate the Act does not contemplate persons applying for permits *benami* In India *benami* transactions are recognised and not frowned upon (See *Gur Narayan* v. *Sheolal Singh*[4]) In *Commissioner of Income-tax, Gujarat* v. *Abdul Rahim & Co.*[5] it was held by this Court that the registration of the partnership deed under section 26-A of the Indian Income-tax Act, 1922, cannot be refused on the ground that *K* was the *benamidar* for *V*.

We see nothing in the Act which expressly or by implication bars *benami* transactions or persons owning buses *benami* and applying for permits on that basis".

The principle of the judgment of the Supreme Court just referred to would clearly be applicable to the instant references. Though the firm was the owner of the lorries and operating them, the partnership cannot be regarded as illegal merely because the permits in regard to them stood in the name of their original owners. That conclusion is inescapable in view of the decision of the Supreme Court in the Civil Appeal.

The question in the two references are answered in favour of the assessees with costs. Counsel's fee Rs. 250 one set.

T.K.K. — *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE A. ALAGIRISWAMI.

The Workmen of the Jawahar Mills, Salem represented by the Secretary, The Salem District Mills Worker's Union, Jawahar Mills, Branch, Salem .. *Petitioner**

v.

The Management of the Jawahar Mills Ltd., Salem, and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 2 (k) and (s)—Non-employment of a person who is not "workman" as defined in the Act—If can from subject-matter of an "industrial dispute."

Even if there is a community of interest between workmen and a person, who is not a workman, the question of non-employment of the latter cannot form the subject-matter of an industrial dispute. The industrial Disputes Act is intended to deal with the problems and welfare of workmen as defined in the Act and not with the welfare or the employment or the non-Employment of persons who are not workmen. It would be wholly contrary to the purpose of the Act and its spirit to hold that such a dispute can form an industrial dispute and can be referred for adjudication by the Labour Court. It is totally outside the scope of the Act.

Assam Chah Karmachari Sangha v. *Dimakuchi Tea Estate*, (1958) S.C.J. 637: (1958) S.C.R. 1156 : A.I.R. 1958 S.C. 353 : (1958) 1 L.L.J. 500, Foll.

1. I.L.R. (1966) 2 Mad. 477 : (1966) 1 M.L.J. 363.
2. (1963) 2 M.L.J. 20.
3. (1959) Andh L.T 725 : (1959) 2 An. W.R. 407.
4. (1918) L.R. 46 I.A. 1 : 36 M.L.J. 68 : I.L.R. (1919) 46 Cal 566 (P.C.).
5. (1965) 55 I.T.R. 651 : (1965) 2 S.C.R. 13 : (1965) 1 I.T.J. 462 : (1965) 1 S.C.J. 434 : A.I.R. 1965 S.C. 1703.

* W.P. No. 2126 of 1968. 24th February, 1970.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Labour Court, Coimbatore in I.D. No. 1 of 1967, dated 27th May, 1967 published in pages 10 to 13 of the *Fort St. George Gazette,* dated 14th June, 1967 and quash the same.

S. Ramaswami, for Petitioner.

M. R. Narayanaswami, for first Respondent.

The Court made the following

ORDER.—The petitioners are the workmen of the Jawahar Mills, Salem. One Babu Chettiar, who was working as a spinning master, had his services terminated by the management from 1st January, 1966. At the instance of the petitioners the dispute regarding the termination of his services was referred to the Labour Court, Coimbatore for adjudication, and the Labour Court has held that there is no industrial dispute in this case, as the Union is not entitled to agitate the question regarding the termination of services of Babu Chettiar. I think the decision of the Labour Court is correct. One need hardly take the trouble of examining the provision explaining the scope of the Industrial Disputes Act. It would be enough to refer to the relevant portions of the Supreme Court's judgment in *Assam Chah Karmachari Sangha* v. *Dimakuchi Tea Estate*[1], because in the present case Babu Chettiar was admittedly not a workman as defined in section 2 (*s*) of the Industrial Disputes Act, though he was a member of the petitioners' Union as in the case before the Supreme Court. The relevant portions in the Supreme Court's judgment are:

"......................while we agree that the expression 'any person' cannot be completely equated within 'any workmen' as defined in the Act, we think that the limitation formulated by the learned Counsel for the appellants is much too widely stated and is not quite correct. We recognise that if the expression 'any person' means 'any workmen' within the meaning of the Act, then it is difficulty to understand why the Legislature instead of using, the expression 'any workmen' used the such wider expression 'any person' in the third part of the definition clause. The very circumstances that in the second part of the definition clause the expression used is 'between employers and workmen or between workmen and workmen,' while in the third part the expression used is 'any person' indicates that the expression 'any person' cannot be completely equated with 'any workman.' The reason for the use of the expression 'any person' in the definition clause is, however not for to seek. The word 'workmen' as defined in the Act (before the amendments of 1956) included, for the purpose of any proceedings under the Act in relation to an industrial dispute, a workman *discharged during the dispute.* If the expression 'any person' in the third part of the definition clause were to be strictly equated with 'any workman,' then there could be no industrial dispute, prior to 1956, with regard to a workman who had been discharged earlier than the dispute, even though the discharge itself had led to the dispute. That seems to be the reasons why the Legislature used the expression 'any person' in the third part of the definition clause so as to put it beyond any doubt that the non-employment of such a dismissed workmen was also within the ambit of an industrial dispute. There was wide gap between a 'workman' and 'employee' under the definition of the work 'workman' in section 2 (*s*) as it stood prior to 1956, all existing workman were no doubt employees; but all employees were not workmen. The supervisory staff did not come within the definition. The gap has been reduced to some extent by the amendments of 1956; part of the supervisory staff (who draw wages not exceeding five hundred rupees per mensem) and

1. (1958) S.C.J. 637 : (1958) S.C.R. 1156 : A.I.R. 1958 S.C. 353 : (1958) 1 L.L.J. 500.

those who were otherwise workman but were discharged or dismissed earlier have also come within the definition. If an when the gap is completely bridged, 'workman' will be synonymous with employees whether engaged in any skilled or unskilled manual, supervisory, technical or clerical work, etc. But till the gap is completely obliterated *there is a distinction between workmen and non-workmen and that distinction has an important bearing on the question before us.* Limitation (3) as formulated by learned Counsel for the appellants ignores the distinction altogether and equates 'any person' with' any employee'—past present or future; this, we do not think, is quite correct or consistent with the other provisions of the Act. The Act avowedly gives a restricted meaning to the word 'workmen' and almost all the provisions of the Act are intended to confer benefits on that class of persons who generally answer to the discription of workmen. The expression 'any person' in the definition clause means, in our opinion, a person in whose employment, or non-employment, or terms of employment or conditions of labour the workmen as a class have a direct or substantial interest—with whom they have under the scheme of the Act a community of interest. Our reason for so holding is not merely that the Act makes a distinction between workmen and non-workmen, but because a dispute to be a real must be one in which the parties to the dispute have a direct or substantial interest. *Can it be said that workmen as a class are directly or substantially interested in employment, non-employment, terms of employment, or conditions of labour or persons who belong to the supervisory staff and are, under provisions of the Act, non-workmen or whom the Act has conferred no benefit, who cannot by themselves be parties to an industrial dispute and for whose representation the Act makes no particular provision? We venture to think that the answer must be in the negative.*"

Earlier at page 507 their Lordships give an example and observed:

"Take for example, another case where the workmen raise an objection to the salary or remuneration paid to a manager or chief medical officer by the employer but without claiming any benefit for themselves, and let us assume that a dispute or difference arises between the workmen on one side and the employer on the other over such an objection. If such a dispute comes within the definition clause and is referred to an industrial tribunal for adjudication, the parties to the dispute will be the employer on one side and his workmen on the other. The manager or the chief Medical Officer cannot obviously be a party to the dispute, because he is not a 'workman' within the meaning of the Act and there is no dispute between him and his employer. That being the position, the award, if any, given by the tribunal will be binding under clause (*a*) of section 18, on the parties to the dispute and not on the manager or the chief Medical Officer. It is extremely doubtful if in the circumstances stated that tribunal can summon the manager or the chief Medical Officer as a party to the dispute, because there is no dispute between the manager or chief Medical Officer on one side and his employer on the other. Furthermore, section 36 of the Act does not provide for representation of a person who is not a party to the dispute. If, therefore, an award is made by the tribunal in the case which we have taken by way of illustration, that award, though binding on the employer, will not be binding on the manager or chief Medical Officer. It should be obvious that the Act could not have contemplated an eventuality of this kind, which does not promote any of the objects of the Act, but rather goes against them."

The last portion of the judgment of the Supreme Court in the earlier extract is clinching as far as this question is concerned. On behalf of the petitioners it was sought to be argued that what is important is the community of interest between the workmen on the one hand and the employment or non-employment of any person (though not a workman) in which they are interested on the other and that the workers are interested in having a good spinning master, and that is the community of interest between the spinning master and the workers in the mills.

Reference is made to be minority judgment in the Supreme Court case, where Sarker, J. observed at page 524:

" If this is sufficient interest to constitute an industrial dispute, I fail to seen why the workmen have no sufficient interest in a dispute in which they claim that a forman who is particularly rude and brutal in his behaviour should be removed and should have a more human foreman. This is surely a matter in which the workmen raising the dispute have a personal and immediate interest and not, as in the last case, an interest in the prevention of something happening in future, which conceivably may never happen at all. Such an interest is plainly nearer to the ordinary kinds of interest, than the interest in solidarity of labour or in the prevention of future harm which in the preceding paragraphs have been found to be sufficient to sustain in industrial dispute. The dispute last imagined would undoubtedly be an industrial dispute if the foreman was a workman, for then it would be entirely within the definition of an industrial dispute. Now suppose the foreman was not a workman, can it be said that then the dispute would not be an industrial dispute? Would the interest of the workmen in the dispute be any the less or in any way different because the foreman whose dismissal was demanded was not a workmen? I conceive it impossible to say so. Therefore, if interest is the test, the dispute that I have imagined would have to be held to be an industrial dispute whether or not the foreman concerned was a workman.

Now, assume that the dispute did not arise out of demand for the dismissal of a foreman. But against his dismissal on the ground that he was a particularly kind and sympathetic man and the workmen were happy under him. In such a case the interest of the workmen in the dispute would be the same as their interest in the dispute demanding the foreman's dismissal. They would be demanding his reinstatement in their own interest; they would be demanding it to make sure that their work would be easy and smooth and that they would be happy in the discharge of it. Such a dispute therefore also has to be held to be an industrial dispute and, as in the last case, it would make no difference for this purpose that the foreman concerned was not a workman.

If this is right, as I think it is, then similarly the dispute concerning the dismissal of Dr. Banerjee would be an industrial dispute for the workmen have sufficient personal and immediate interest in seeing that they have a doctor of their liking to look after them. It is indeed the case of the workmen that by his devotion to duty and good behaviour Dr. Banerjee became very popular with the workmen. Whether the contention of the workmen is justified or not and whether it would be upheld by the Tribunal or not, are wholly different matters and do not affect the question whether in an industrial dispute the workmen must be interested. It is enough to say that I find no reason to think that the appellant has interest in the dispute concerned the dismissal of Dr. Banerjee. Therefore, I would hold that even if it is necessary to constitute an industrial dispute that workmen must have in interest in it, the dispute before us is one in which the appellant have a direct and substantial interest and it is an industrial dispute."

But this goes quite contrary to the view of the majority and cannot be taken to lay down the law correctly. I may also refer to a decision of a Bench of this Court in *Vijayakumar Mills Ltd.* v. *V. M. National Worker's Union*[1], where the dispute was with regard to the non-employment of a person, who was admittedly a workman. Even there the Bench took the view that the question whether the other workers have a direct or substantial interest in the non-employment of the person will depend upon the facts and circumstances of the case, and on the circumstances of that case they came to the conclusion that his services in the matter of time-keeping

1. (1965) 1 M.L.J. 448 : I.L.R. (1964) 1 Mad. 798 : A.I.R. 1964 Mad. 395 : (1964) 2 L.L.J. 399.

are so intimately connected with the work of the industrial workers that one can easily say that the workers as a class are directly and substantially interested in the non-employment or employment of that person. Thus, it is obvious that even where the dispute relates to the employment or non-employment of a workman, he and the other workmen raising the dispute must have a community of interest. It follows with even greater force that even if there is a community of interest between workman and a person, who is not a workman, the question of non-employment of the latter cannot form the subject-matter of an industrial dispute. The Industrial Disputes Act is intended to deal with, the problems and welfare of workmen and defined in the Act and not with the welfare or the employment or the non-employment of persons who are not workmen. It would be wholly contrary to the purpose of the Act and its spirit to hold that such a dispute can form and industrial dispute and can be referred for adjudication by the Labour Court. It is totally outside the scope of the Act. The writ petition is therefore dismissed. No costs.

V.K. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M. NATESAN.

Sri Nagama Naicker and another .. *Appellants**

v.

Ponnuchinnayyan, alleged adopted son of Chitrasenan Naicker, Velampatti, Emakkalapuram Village, Dindigul Taluk .. *Respondent.*

Hindu Succession Act (XXX of 1956), *sections* 14, 10 *and* 19—*Co-widows of deceased intestate succeeding to the estate—Nature of estate taken—If take jointly with right of survivorship.*

It is no doubt true that under the Mitakshara System of Hindu law as it existed earlier the co-widows of a Hindu dying intestate succeeded to his estate jointly with rights of survivorship among them. But on the coming into force of the Hindu Succession Act, 1956 their joint tenancy becomes converted into a tenancy in common in equal shares to conform to the full rights of ownership and the rules of succession contained in sections 10 and 16 of the Act will apply to their property. On the death of one of the co-widows, after the coming into force of the Act, her heirs under the provisions of the Act succeed to her share in the property.

Under the Hindu Succession Act, 1956 a joint estate is not recognised as section 19 of the Act would show. Hence after the coming into force of the Act the position of co-owners that have succeeded to an estate is that of co-tenants in respect of their respective shares to which they have absolute right under the Act.

The rule of survivorship among co-widows, though not expressly taken away by the Act, cannot operate as it is incompatible with the absolute heritable estate conferred under the Act and under section 4 (1), the provisions of the Act has an overriding effect.

(Earlier case-law discussed—Effect of sections 14, 15 and 16 explained).

Appeal against the decree of the Subordinate Judge, Dindigul, in Appeal Suit No. 83 of 1962 preferred against the decree of the District Munsif of Dindigul in Original Suit No. 226 of 1960.

K. N. Balasubramaniam and *S. Kulandaivelu*, for Appellants.

K. S. Desikan and *K. Raman*, for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 3 and 4 have preferred this second appeal from the concurrent decision of the Courts below giving the plaintiff a decree for partition and separate possession of a 5/8th share in the suit properties.

*S.A. No. 1772 of 1963. 1st December, 1967.

The suit properties originally belonged to one Chitrasenan Naicker, who died in May 1953, leaving behind him three widows, defendants 1 and 2 in the suit, and another Pappammal, who died in 1959 after the Hindu Succession Act of 1956. The plaintiff is the adopted son of the said Chitrasenan Naicker and in that right claimed partition and possession of his share in the properties. In the Courts below, the adoption was disputed. But it has been established by unimpeachable evidence and corroborated by a registered deed of adoption Exhibit A-14, dated 19th July, 1945. The plaint alleged that in collusion with the two surviving widows defendants 1 and 2, who had become absolute owners of their respective shares in the suit properties under the Hindu Succession Act of 1956, hereinafter referred to as the Act, defendants 3 and 4 were in enjoyment of the whole of items 1 to 3. With reference to the possession of other items of properties certain other persons defendants 5 to 7, were impleaded as parties. They have remained *ex parte* and no question arises with reference to those items. In answer to the plaintiff's claim, it was contended by defendants 3 and 4 that items 1 to 3 were jungle lands in Sirumalai Hills and were sold to them by Chitrasenan Naicker himself orally for a consideration of Rs. 90 in May, 1953 and that ever since, they were in enjoyment of the lands. They pleaded that the sale was for family benefit and necessity and that they had effected improvements for considerable amount to the properties. Defendants 1 and 2 by their written statement supported the claim of defendants 3 and 4, besides disputing the adoption. But at the trial defendants 1 and 2 also remained *ex parte*. The first defendant died pending suit and the plaintiff as heir claimed her interest in the suit properties also, and he has been given a decree in all for 5/8th share. There has been no discussion before me as to the quantum of share which the plaintiff is entitled, in the properties. The suit has been instituted on 30th July, 1960 and so, no question as to adverse possession can arise by virtue of the possession of items 1 to 3 by defendants 3 and 4. The contest in the case was as to the truth and validity of the oral sale of items 1 to 3 claimed by defendants 3 and 4. The Courts below, on a careful consideration of the evidence, have come to the conclusion that the oral sale is not true. They have found that defendants 3 and 4 did not enter on the possession of the disputed items before 1955, and that they must have entered on the properties long after the death of Chitrasenan Naicker by some collusive arrangements with the widows, defendants 1 and 2. It has also been found that the properties must have been worth about Rs. 1,500 at the time of the alleged sale for Rs. 90. The finding against the oral sale on ample and substantial evidence is not amenable to reconsideration in second appeal.

In second appeal as a question of law the learned Counsel for the appellants contends that the plaintiff cannot claim more than half share in the suit properties as Act XXX of 1956, according to Counsel does not affect the law of survivorship under which co-widows of a Hindu took his property. It is submitted, that the Act does not specifically abrogate or extinguish the rule of joint tenancy and survivorship under which the co-widows of a Hindu took his properties. The argument is that as long as the second defendant, the surviving co-widow, is alive and is not claiming the properties in the possession of defendants 3 and 4, the plaintiff cannot claim shares in the properties by inheritance on the death of the other two widows and his share must be limited to his half share in the properties. This point was not argued in the Courts below. However, it could be considered here being a pure question of law. But there is an obstacle to the appellants claiming any relief in the second appeal as framed relying on the second defendant's title, assuming that the contention could be maintained. The second defendant has not been made a party-respondent to the appeal. The plaintiff has been given a decree against her. Admittedly even, the title to the property is in her. It may be that the appellants are in possession, but they could maintain that possession only on her having title and right to possession of the whole. But the decree against the second defendant for partition and possession has become final, and in her absence, the appellants cannot question the validity of the decree against her. They do not have any right of their own or even as transferees *pendente lite* from her, to fight out her case an have the benefit of it. The plea is only in the nature of *jus tertii* and it falls with

the decree against her which has become final. However, I shall consider the point raised. It has been made a ground of second appeal. The question is an interesting one, though not difficult and deserves examination. But the matter, I find is not *res integra*.

On this question, we have first the decision in *Sundarammal* v. *Sadasiva Reddiar*[1] no doubt a decision of a single Judge, but of weighty authority, of Ramachandra Ayyar, J., as he then was. A point was raised in that case that as the co-widow took a joint estate, a suit in ejectment by one only of the co-widows could not be maintained. Dealing with the contention, the learned Judge observed at page 350:

"Under the Hindu Succession Act a joint estate is not recognised as section 19 of the Act would show. I am therefore, of opinion, that after coming into force of Act XXX of 1956 the position of co-widows is that of co-tenants in respect of absolute right to which they are entitled under the Act. If so much is conceded the rest becomes easy. The plaintiff will be in the position of a co-tenant in regard to her husband's estate which was vested in her absolutely by the passing of Act XXX of 1956. It is well settled that a co-tenant can in her own right institute a suit for the ejectment of a trespasser."

Again in *Rathinasamy* v. *Nagammal*[2], the learned Judge, Anantanarayanan, J., the present Chief Justice, as he then was, applied section 14 (1) of the Hindu Succession Act to co-widows. In that case two widows of the last male-holder, who died in 1931, entered into an arrangement *inter se* between themselves, one of the widows a certain Poornathachi, taking the property concerned in the suit for her life time. The property had to go to the co-widow and her daughter after her. The widow, Poornathachi who took the property for her life, died after the Hindu Succession Act came into force, settling the property she got under the arrangement, in favour of a third person. It is the validity of this settlement after the life time of Poornathachi that was canvassed. Of course the question mooted was not whether section 14 of the Act would at all apply, but whether section 14 (1) or section 14 (2) applied on the facts of the case. The Courts below had negatived the application of section 14 (1) of the Act in the view that the widow had by her own volition entered into an arrangement restricting her interest in the property for her life. The learned Judge upholding the settlement referred to section 14 (1) and observed thus (at page 134):

"In this view, it is clear that though the two widows entered into some kind of arrangement for the convenient enjoyment of the estate of the late Singara Konar, Poornathachi was in legal possession of at least her half share or interest in the suit property absolutely at the time of her death.

.... In this view, Poornathachi would become the absolute owner of her undivided half interest in the suit property at the time Act XXX of 1956 came into force."

The contention of Mr. K. N. Balasubramaniam, the learned Advocate for the appellants, is that there is no indication in the Act whether the right of survivorship as between the co-widows should continue or not after the Act. My attention was drawn by the learned Counsel to section 4 of the Hindu Succession Act, which enunciates the overriding effect of the Act and it was submitted that it does not affect the operation of survivorship between co-widows. Learned Counsel argued that the rule of survivorship as between co-widows was not a rule of statutory law, for section 4 (1) (*b*) to apply. Only under section 4 (7) (*b*) laws inconsistent with the provisions of the Act ceased to apply. Under section 4 (1) (*a*) except as otherwise expressly provided in the Act, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect, with reference to any matter for which a provision is made in the Act. Learned Counsel submitted that no provision has

1. (1959) 1 M.L.J. 120 : A.I.R. 1959 Mad. 2. I.L.R. (1963) Mad. 133.

been made in the Act for cessation of the rule of survivorship amongst co-widows for section 4 (1) (*a*) to apply. Section 19, which deals with the mode of succession of two or more heirs and provides for co-heirs taking as tenants-in-common and not as joint tenants, it is contented, is only prospective. But the argument, in my view, ignores the nature of the interest which a co-widow took in her husband's property prior to the Act and the impact of section 14 of the Act on that interest. Section 14 to the extent it operated provided for no implied exceptions. The overriding effect and full operation of section 14 (1) which enlarged the limited estate conferred by Hindu Law on a woman to full ownership was restricted only by sub-clause (2) of the section. Secondly, sections 15 and 16, which lay down rules, of succession to the property of a female Hindu dying intestate and to the order of succession and the manner of distribution among heirs of a female Hindu has overriding effect notwithstanding any text, rule, or interpretation of Hindu Law or any custom or usage of Hindu Law.

Now let me examine the characteristics of the estate taken by co-widows, the property they had therein, to fix the impact of the Act thereon. The nature of the estate taken by the co-widows in thus defined in the recent decision of the Supreme Court, in *Karpagathachi* v. *Nagarathinathachi*[1].

> " Under the Hindu Law as it stood, in 1924, two widows inheriting their husband's properties took together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment. They were entitled to enforce a partition of those properties so that each could separately possess and enjoy the portion allotted to her..........Neither could without the consent of the other enforce an absolute partition of the estate so as to destroy the right of survivorship. But by mutual consent they could enter into any arrangement regarding their respective rights in the properties during continuance of the widows estate, ...The interest of each widow in the properties inherited by her was property and this property together with the incidental right of survivorship could be lawfully transferred.............. .... The widows were competent to partition the properties and allot separate portions to each, and incidental to such allotment, each could agree to relinquish her right of survivorship in the portion allotted to the other."

Prior to the Hindu Succession Act, where a Hindu died leaving two or more widows, they took the estate jointly and even when in joint possession any of them could alienate her undivided interest in her husband's property. But she had only a limited interest, her interest did not enure beyond her life. Each of the widows could deal as she pleased with her own *life interest*. But she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the surviving widow or a future reversioner. Together acting, the co-widows could burden the reversioner with debts incurred for legal necessity. A close examination would show that the joint estate with rights of survivorship assigned to co-widows inheriting their husband's estate is just a consequence of the limited estate which a Hindu woman took in her husband's property prior to the Act. The co-widows took the property of their husband as a single heir, in a sense the husband's *persona* was said to continue in his widows and naturally all the widows together took his property as one estate. As long as the last of the widows survived, the husband's brothers or reversionary heirs had no interest in the estate. Their was a *spes successionis.* Succession opened only on the death of the last of the widows. In *Bhugwandeen Doobey* v. *Myna Baee*[2], in the head-note the following passage occurs:

> " Where a childless Hindu dies, leaving two widows surviving, they succeed by inheritance to their Husband's property as one estate in co-parcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one widow without the concurrence of the other."

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1. (1965) 2 An.W.R. (S.C.) 61 : (1965) 2 S.C.J. 445: (1965) 2 M.L.J. (S.C.) 61: A.I.R. 1965 S.C. 1752, 1753.
2. (1866-67) 11 M.I.A. 487.

Therein in the course of a detailed judgment Sir James William Colvile, J., observed at 515 and 516:

> " For the estate of two widows who took their husband's property by inheritance is one estate. The right of survivorship is so strong when the survivor takes the whole property to the exclusion even of, daughters of the deceased widow....................They are, therefore, in the strict sense, coparceners, and between undivided coparceners, there can be no alienations by one without the consent of the other."

But manifestly the interest of the co-widows in their husband's estate is proprietory, though limited. Joint tenancy comes in when there is a vesting of lands on two or more persons in such a manner as to impart to the property with respect to all other persons than the persons in whom they vest the properties of single owner. As between themselves, the persons, who takes as joint tenants, have separate rights, but as against every-one else, they are in the position of a single holder. While the widow or widows, if there is more than one, represented the entire estate, still under the Hindu Law as it prevailed, succession had to be traced only from the last male holder. The rule of survivorship which existed between co-widows really follows from or is the practical result of the fact that on the coming to the end of the life estate of one widow succession will once again have to be traced to the husband, when the surviving widow or widows take the property.

In *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*[1], it is stated ;

> " A partition converting the joint estate into an estate in severality, whenever either of the widows choose to insist upon it, quite incompatible with the right of survivorship to the whole property arising out of the joint estate for life and the *surviving widow or widows being the nearest heir or heirs of the husband*, (italics mine) "

In *Sarkar, Hindu Law*, 8th Edition, at page 579, the principle of survivorship is thus explained:

> " It is no doubt true, that when the male heirs, take the Hindu widows' estate, the share which may on partition, be allotted to any one of them, will, on her death, during the life time of the others pass to the latter as being the then next taker or reversionary heir of the last male owner.
>
> But this devolution is mistaken for passing by *survivorship* and consequently the tenancy of the female heirs is deemed to be an inseparable joint-tenancy in those cases in which they take the *widow's* estate-according to the Dayabhaga."

Whatever the incidents may be with reference to the property inherited by co-widows, whatever may be the limitation placed on it, clearly the interest of a co-widow in the property which she takes on the death of her husband, is certainly proprietory in character—see—*Karpagathachi* v. *Nagarathinathachi*[2]. The property held by a co-widow is indubitably property falling under section 14 (1) of the Hindu Succession Act, even as the property taken by a single widow on inheritance to her husband. As each wife is equally entitled to succeed to her husband, all the wives take together as a single heir with survivorship.

> " The singular number ' wife ' in the text of Yagnavalkya, singifies the kind ; hence if there are several wives belonging to the same or different classes they divide the property according to the shares prescribed to them and take it."

The *Explanation* defining property for purposes of section 14 (1) is very comprehensive in its scope and includes property acquired by a female Hindu by inheritance, devise, partition, etc. The *Explanation* includes property *acquired in any other manner whatsoever*. It cannot, in the face of the wide definition of property, be contended that the property held by co-widows, considered from the stand point of each one of the co-widows, is not property falling under section 14 (1) of the Act. If they

1. (1868) 3 M.H.C.R. 424, 453.
2. (1965) 2 M.L.J. (S.C.) 61 : (1965) 2 An. W.R. (S.C.) 61 : (1965) 2 S.C.J. 443: A.I.R. 1965 S.C. 1752.

are possessed of the properties as the word *possessed* has been interpreted in several decision recently, that possession will certainly attract the operation of section 14 (1) of the Act. Section 14 (1) predicates two requirements for the enlargement of the estate held by a female Hindu; (*i*) the property must have been acquired by her before or after the commencement of the Act and (*ii*) it must be possessed by her. Where the acquisition confers on her only a limited estate, the Act enlarges it and confers on her full ownership in the property. The limited ownership given to a female owner under Hindu law is converted into an absolute estate with all powers of disposition. The widow's estate becomes an absolute estate in her hands inheritable by her own heirs, and not reverting to the heris of the last male holder.

The estate, thus, englarged in her hands if it has been undisposed of by her devolves on her heirs according to sections 15 and 16. Succession to property of the female dying intestate has, therefore, to be traced under sections 15 and 16. The rule of survivorship among co-widows though not expressly provided against, cannot operate as it is incompatible with the absolute heritable estate conferred. As provision for succession to the widow has been made, the over-riding effect of section 4 (1) comes into operation. As pointed out earlier, survivorship among co-widows comes in as an incident of the limited ownership of the Hindu widow. Prior to the Act on the death of the co-widow whatever interest she had, survived, to the co-widow, as the co-widow was the husband's next heir. The Act has not only enlarged of the estate of the Hindu widow, but also provided for succession to the estate of the widow making her a stock of descent for property inherited by her. So, any text ,rule or interpretation of Hindu law in force before the Act has to yield before the Act operating in the manner provided therein. Section 4 (1) (*a*) has to be applied so as to make the express provisions of the Act effective. Provisions have been made against survivorship by section 15 and the operation of section 15 has been facilitated by conferring an absolute heritable estate on the widow and making her the full owner by section 14 (1) of the Act.

It follows that on the coming into force of the Hindu Succession Act (XXX of 1956) two or more female heirs taking jointly with rights of survivorship become full owners; their joint tenancy becomes converted into a tenancy in common in equal shares to confoim to the full rights of ownership and the rules of succession contained in sections 15 and 16 of the Act. On the death of a co-widow after coming into force of the Act, her heirs under the provisions of the Act succeed to her share in the property.

In the circumstances, the three widows of Chitrasenan Naicker became full owners of the properties they inherited on the death of their husband, and became tenants-in-common. When Pappammal died in 1959, there was no survivorship to her interest by the other co-widows. The plaintiff inherited as her heir. Even so, the plaintiff inherited the share of Kuppammal, who died pending suit. It follows that defendants 3 and 4 cannot rely upon the existence of any outstanding interest in the properties in the second defendant in excess of her own share by her surviving her co-widows.

The only other question that calls for consideration is the claim for improvements put forward by defendants 3 and 4. The trial Court has estimated the improvements that could be related to the plaintiff's share at Rs.750. The plaintiff became a major only in 1958 and it is pointed out that any improvements made must have been earlier. They were trespassers and the finding is that they had no good faith as they were fully aware of the fact that the plaintiff was the adopted son of Chitrasenan Naicker. They were trespassers on the property with the acquiescence of defendants 1 and 2, who the learned Subordinate Judge observes were more interested in seeing that the plaintiff got nothing. They had been on the property from 1955 and the plaintiff had claimed no mesne profits prior to suit. He has been content with the profits *pendente lite*. Having regard also to this aspect of the matter, the Courts below rightly negatived the claim of defendants 3 and 4 for improvements.

In the circumstances, the second appeal fails and it is dismissed with costs. No leave.

R.M. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE A. ALAGIRISWAMI.

Chinna Varaguna Rama Pandian and others .. *Appellants**

v.

Chelladurai *alias* Thiruvarasu Pandian and others .. *Respondents.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), section 42 (1)—Period of limitation prescribed under—Scope of.

Section 42 (1) of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948, no doubt prescribes a period of limitation of six months from the date of the deposit for making a claim out of the compensation amount. But this period of limitation has nothing to do with particular parties, but deals only with claims to or against the compensation amount. The time limit, therefore, applied with reference to the claim to or against the compensation amount and not against any person or party. Where certain maintenance holders were impleaded parties before the Estates Abolition Tribunal as a consequence of which it became necessary to re-allocate the quantum of shares in the compensation, the Tribunal has jurisdiction not only to do so but also to direct the restitution of the excess amount drawn by the parties earlier. No question of limitation under section 42 (1) of the Act could arise in such cases.

Appeal against the Decree of the Estates Abolition Tribunal of Tirunelveli in O.P. No. 4 of 1960.

K. Parasaran, for Appellants.

R. Sundaralingam, The Additional Government Pleader, *N. Sivamani* and *V. Narayanaswami*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The only substantial point that arises in the appeal is one of limitation. The Sivagiri estate was notified and taken over with effect from 3rd January, 1951, under the provisions of Madras Act XXVI of 1948. Respondents 1 and 2, who are the illegitimate sons of the principal landholder, applied by O.P. No. 167 of 1951 for maintenance. The principal landholder, who was the only party impleaded, opposed the claim under section 42, and successfully. Against the order of the Tribunal dated 9th August, 1954, rejecting the claim, the respondents filed S. T. A. No. 138 of 1954, which was eventually allowed by this Court on 25th January, 1960. In the meantime, on 16th August, 1955, the principal landholder died and his legal representatives were brought on record in the appeal. This Court was of the view that the respondents in view of a special custom, were entitled to maintenance. *See Chelladorai* v. *Chinnathambiar*[1]. On that view of the right of the respondent to get maintenance, this Court remitted the original petition filed by them for fresh disposal by the Tribunal. On 22nd July, 1961, the respondents filed I.A. No. 303 of 1961 by which they prayed to implead the present appellants as respondents in the original petition. The appellants are the sons of the landholder previous to the principal landholder and are maintenance holders recognised by the provisions of the Act. Eventually, the claim for maintenance by the respondents was allowed on 27th November, 1961. In doing so, the Tribunal not only reallocated the quantum of shares the appellants and the respondents would each be entitled to out of the compensation deposited, but also directed that the excess

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*S.T.A. No. 56 of 1962. 19th September, 1968.

1. I.L.R. (1960) Mad. 880 : (1960) 2 M.L.J. 219.

drawn by the appellants prior to 27th November, 1961, should be restituted. The appeal before us is from that order.

As we mentioned earlier, the only point raised for the appellants is that the order of the Tribunal in so far as it related to restitution of the excess drawn out of the compensation by the appellants cannot be supported as the respondent's claim to maintenance, *vis-a-vis* the appellants, can be regarded as having been made only on 22nd July, 1961, when the respondents made the application to implead the appellants as party respondents in that claim for maintenance. The Tribunal did not accept this view. It said that there was no question of limitation because the respondents came forward with their claim as early as 1951, and those petitions were still pending. The Tribunal added that the fact that some of the objectors were paid a share as maintenance-holders in accordance with the orders passed by the Tribunal on 5th January, 1954, would not confer upon them any superior right. It seems to us that the conclusion of the Tribunal that no question of limitation arises is correct, though we would say so on a different ground. Section 42 (1) does prescribe a period of limitation, *viz.*, six months from the date of the deposit for making a claim out of compensation. Discretion was given to the Tribunal to extend the time, but subject to a limit of six months. Amendments have since been carried out to section 42 by Madras Act XXI of 1963, with which we are not, however, concerned as the impugned order was made prior to that Act, and on, as we said, 27th November, 1961. The period of limitation was prescribed only in respect of every person claiming the compensation. The time limit ,therefore, applied with reference to the claim to or against the compensation and not against any particular person or party. It may be visualised that in particular cases a claim to or against compensation may be made without there being any opponent, or a rival claimant. The analogy of section 22 of the old Limitation Act does not hold good in respect of the scope of the limitation prescribed by section 42 (1). Section 42 (1) has nothing to do with particular parties, but deals only with claims to or against compensation and the limitation is related to such a claim. It follows, therefore, the contention of the appellants that the claim of the respondents so far as the appeals are concerned should be regarded as having been made only on 22nd July, 1961, cannot be accepted. The appeal is dismissed but with no costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. PALANISWAMY.

P. Krishnamurthy and others .. *Appellants**

v.

Thambaram Panchayat by its Executive Officer, Narayanaswamy, now the Tambaram Municipality, by its Special Officer and another .. *Respondents.*

Evidence Act (I of 1872), section 116—Estoppel—Landlord and tenant—Tenant, when estopped from denying title of landlord—True owner evicting tenant let in by a benamidar or agent—Tenant attorning to true owner—If can deny title of the benamidar or agent.

Madras Land Encroachment Act (III of 1905), section 7—Notice under—Effect—Government authorising Panchayat to lease out lands for specified period—Tenants let into possession by Panchayat—Government issuing notices under Land Encroachment Act and collecting kist from the occupants after expiry of the period—Suit by Panchayat for rent after the expiry of the period—Occupants if estopped from denying title of Panchayat.

Where lands belonging to the Government were leased by a Panchayat to a number of tenants under a specific authority given by the Government to the Panchayat for a specified period, the Panchayat will have no right over the land or

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*S.A. Nos. 1136, 1144 to 1146 of 1965 and C.R.P. Nos. 1353, 1958 to 1974 of 1964 and 1599 to 1605 of 1965. 17th March, 1969.

claim arrears of rent from the occupants after the expiry of the authority given to it by the Government in that regard. If after the expiry of the period for which the Panchayat was empowered to lease the land and collect rent, the Government issues notices to the occupants under the Land Encroachment Act and collects kist from them, it is apparent that the Government as the true owner has evicted the tenants let into possession by the Panchayat. In such circumstances the tenants will not be estopped from contending that the Panchayat is no longer entitled to collect rent from them.

The rule of estoppel laid down under section 116 of the Evidence Act is not absolute. It is well settled that where the true owner evicts the tenant let into possession by another, the tenant could attorn to the true owner and set up his title in answer to a suit filed by the landlord who let him in possession. The only limitation is that so long as the tenancy is subsisting the tenant is not entitled to set up a *jus tertii* in a third person. Where the tenant is evicted from possession by the true owner, the tenancy comes to an end and there is nothing in law to prevent the tenant from attorning to the true owner. In such cases it is not necessary that the eviction of the tenant should be by actual dispossession. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the tenant is not put physically out of possession, it would in law amount to eviction. The question whether there was a threat of eviction and wether that threat was sufficient in law to make the tenant attron to the person putting forward the threat has to be decided upon the facts and circumstances of each case.

A notice under section 7 of the Land Encroachment Act by the Government amounts in law to eviction and payment of kist by the persons in possession to the Government would be sufficient to entitle them to plead *jus tertii*, though they might have been let into possession by someoneelse and though there may not be the relationship of landlord and tenant between them and the Government.

Kuppu Konan v. *Thirugnanasammandam Pillai*, (1908) I.L.R. 31 Mad. 461 : *Alaga Pillai* v. *Ramaswami Thevan*, (1925) 49 M.L.J. 742; *B. Gowresu* v. *K. Subadramma*, (1956) An.W.R. 1090; A.I.R. 1957 A.P. 961, referred.

Held, on the facts of the case that the persons originally let into possession by the Panchayat were not estopped from setting up title in the Government.

Appeals against the Decrees of the District Court, Chingleput dated 14th December, 1964 in A.S. Nos. 254, 260, 215 and 236 of 1964 respectively preferred against the decrees of the Court of the District Munsif, Poonamalle in O.S. Nos. 285, 277, 283 and 276 of 1963 respectively.

C.R.P.Nos. 1353, 1958 to 1974 of 1964 and 1599 to 1605 of 1965.—Petitions under section 25 of the Act IX of 1887 and section 115 of Act V of 1908 respectively praying the High Court to revise the decrees of the Court of the Principal District Munsif, Poonamallee, dated 31st March, 1964 in S.C.S. Nos. 245, 236, 222, 223, 225, 227, 228, 232, 233, 234, 235, 221, 237, 240, 242, 246, 275 and 279 of 1963 respectively in C.R.P.Nos. 1353 and 1958 to 1974 of 1964 and to revise the decrees of the District Court, Chingleput, dated 14th December, 1964 in A.S.Nos. 209, 263, 212, 227, 233, 245 and 344 of 1964 respectively (O.S. Nos. 271, 280, 279, 275, 274, 289 and 282 of 1963 respectively on the file of the District Munsif Court, Poonamallee, in C.R.P. Nos. 1599 to 1605 of 1965 respectively.

V. Krishnan and *P. Veeraraghavan*, for Appellants.

The Additional Government Pleader, *V. Shanmugham*, *T. L. Radhakrishnan* and *T.N. Vallinayagam*, for Respondents.

The Court delivered the following

JUDGMENT :—These two batches of cases, one batch of second appeals and another batch of civil revision petitions, can be disposed of by a common judgment,

as the points that arise for consideration are the same. The following facts are necessary to understand the scope of the controversy. Survey Nos. 323 and 324 together measuring an extent of 5-03 acres situated in Tambaram village, Saidapet taluk, are poramboke lands. As per G.O. No. 2114, Public Health, dated 11th June, 1938, Tambaram Town Planning scheme was sanctioned and the aforesaid two survey numbers were reserved for public purposes like erection of markets and building of shops. The District Board, Chingleput, was appointed as the responsible authority under the scheme for its due execution. Subsequently, the Tambaram Panchayat Board became the successor responsible authority for the due execution of the scheme. The period for the function of the responsible authority was extended for ten years upto 10th June, 1963. As the aforsaid two survey numbers had not been owned by the Panchayat or acquired by it as contemplated under the scheme, the Government authorised the Panchayat in 1948 to lease out the lands till 1956-57. Subsequently, as per G.O. No.2779, Health, dated 11th September, 1957, the Government authorised the Panchayat to lease out upto the end of 1957-58. Thereafter, no such authority was given. Acting upon the authority given originaly, the Panchayat leased out portions of the survey numbers to various persons who have put up constructions on the plots leased to them and collected rent. In the course of such collection of rent, disputes arose between the lessees on the one hand and the Panchayat on the other, and as a result of the dispute, some lessees claiming to be the representatives of all the lessees instituted O.S.No. 40 of 1956 on the file of the Sub-Court Chingleput, impleading the Panchayat as a defendant, and prayed for an injunction restraining the Panchayat from interfering with their rights and from asking them to execute lease deeds or to pay rent. That suit was dismissed. One of the grounds of dismissal was that the tenants were estopped from denying the title of the Panchayat. The matter was taken up in appeal and the District Judge, Chingleput, concurring with the view of the trial Judge, dismissed the appeal. There was a further appeal to this Court in S.A.No. 297 of 1958. During the pendency of the appeal in this Court, the State of Madras was impleaded as a party. Jagadisan, J., before whom the appeal came up held that the persons who had filed the suit having come into possession as lessees under the Panchayat were estopped from denying the title of the Panchayat during the subsistence of the lease and dismissed the second appeal. For arrears of rent which accrued subsequently the Panchayat filed some small cause suits which were decreed. Against those decrees, some tenants filed civil revision petitions which also were dismissed by Jagadisan, J., holding that the tenants were barred by the principle of estoppel from denying the title of the Panchayat to collect the rent.

The persons in possession did not pay rent subsequently, and thereupon the Panchayat instituted a batch of original suits and another batch of small cause suits, at first impleading only those, who according to the panchayats, were in possession as lessees. During the pendency of the suits, the Collector of Chingleput, was impleaded as the second defendant in each suit. The Government Pleader on entering appearance for the Collector, Chingleput, endorsed on the plaints that the Government had no objection to the passing of decree in favour of the Panchayat and that if a decree could not be granted in favour of the Panchayat, decree may be passed in favour of the Government. The persons who are in possession and who have been impleaded as the first defendant in each of the suits contended that the Panchayat had no right to maintain the suits, that they were not estopped from denying the title of the Panchayat, as the revenue officials had issued *B* memos. to them treating them as trespassers and threatening eviction, that in those circumstances they had to pay kist to the Government and that, therefore, they were not liable to pay arrears of rent.

The District Munsif, Chingleput, who tried the original suits as one batch and the small cause suits as another batch, held that the suits were maintainable by the Panchayat, and that the plea that the Panchayat had no right to maintain the suits could not be put forward by reason of the bar of estoppel. On the question of limita-

tion, which was one of the pleas raised in defence, the District Munsif found that the entire claim was in time In the result, he decreed all the suits.

In the appeals preferred to the District Judge, Chingleput, the decrees of the trial Court in the original suits were confirmed It is against the decision in those appeals, the second appeals under consideration have been filed. The Civil Revision Petitions have been filed against the decisions of the District Munsif in the batch of small cause suits.

The main ground upon which both the Courts below have negatived the defence is that the defendants are barred by estoppel under section 116 of the Evidence Act from contending that the Panchayat is not entitled to maintain the suit to recover arrears of rent. To find out whether this view is sustainable or not, it is necessary to note in what capacity the Panchayat sought to recover arrears of rent. It is not the case of the Panchayat that it is the owner of the lands in question. A feeble attempt was made on behalf of the Panchayat to show that under clause 8 of the scheme, Exhibit A-1, the Panchayat was entitled to lease out the lands. That clause *inter alia* states that the responsible authority may, in the interest of the scheme, dispose of the lands *acquired under clause 7 or owned by it*, by sale in auction or exchange, lease or otherwise. The lands in question are not lands acquired under clause 7 of the scheme. They are also not lands owned by the responsible authority. The only right under which the Panchayat can claim to recover arrears of rent is by virtue of the authority given by the Government in or about 1956. On the question whether the said authority continued to subsist at the time when these suits under consideration were filed, the two affidavits filed by the Collector of Chingleput, which have been marked as Exhibits B-8 and B-9, make the posiion clear beyond any doubt. In Exhibit B-8 it is stated that though the District Board and the Panchayat were appointed to function as responsible authority, the lands, namely, Survey Nos. 323 and 324, had not been owned by them or acquired by them, but, however, the responsible authority was authorised for leasing out the properties every year till 1956-57 and that after 1956-57, no such authorisation had been given. In Exhibit B-9 it is stated that as per G.O.Ms. No. 2779, Health, dated 11th September, 1957, the Tambaram Panchayat was asked to take action to get lease deeds executed by the lessees after collecting the lease amounts upto the end of the year 1957-58 and that the Panchayat had no authority to lease after 1957-58. It is not the case of either the Panchayat or the Government that after 1957-58 the Government gave any further authority to the Panchayat to lease or to do anything with the lands in question. The authority referred to in Exhibit B-9 came to an end by 1957-58. It, therefore, follows that on the dates when these suits under consideration were filed, the Panchayat had no authority to claim rent on behalf of the Government.

Section 116 of the Evidence Act *inter alia* provides that no tenant of immovable property or person claiming through such tenant, shall, during the continuance of the tenancy be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property. But this rule of estoppel is not absolute.

In these cases, the shop-keepers (lessees) contend that the Panchayat is not the owner and that the Government is the owner. Admittedly, they came into possession under the Panchayat. The question is whether it is open to them, to say that the real owner is the Government and not the Panchayat. In *Venktaanarasimcharyulu* v. *Gangaraju amended as Ganiraju*[1], distinction is pointed out between a case where a person claiming to be the owner of a certain property leases out to a tenant but takes the lease deed in the name of his beneamidar, and the case where a benamidar happening to be in possession of the property on behalf of the real owner grants a lease of it without disclosing his benami character. It is pointed out that in the former case, the tenant's estoppel would operate in favour of the real lessor and not the benamidar. In the second category of cases, the benamidar would come

1. (1941) 1 M.L.J. 554 : A.I.R. 1941 Mad. 607.

within the protection under section 116 as he was the person who in fact leased the property and placed the tenant in possession. Patanjali Sastri, J., as he then was, who decided that case, made the above distinction and distinguished the decision in *Kuppu Konan* v. *Thirugnanasammandam Pillai*[1].

It is well settled by a catena of cases, to which detailed reference is not necessary, that where the true owner evicts the tenant, the tenant could attorn to the true owner and set up his title in answer to a suit for ejectment filed by the landlord who let him into possession. The only limitation is that so long as the tenancy is subsisting the tenant is not entitled to set up a *jus tertii* in a third person. But if the tenant is evicted from possession by the true owner, the tenancy comes to an end and there is nothing in law to prevent the tenant to attorn to the true owner. What kind of eviction is necessary has been a matter of consideration in some cases. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction, which cannot be lawfully resisted, even though the tenant is not put out of possession, the threat to put him out of possession would in law amount to eviction—vide *Alaga Pillai* v. *Ramaswami Thevan*[2]. In the instant cases, it is no doubt not the case of the defendants that they were actually evicted from possession by the Government. Their case is that from about 1958, the Government issued *B* memos. to them treating them as trespassers under the Madras Land Encroachment Act (III of 1905) threatening to evict them, that fearing eviction they have been paying kist to the Government, which has been duly accepted by the Government and that by reason of these events, they are not estopped from contending that the Panchayat is no longer entitled to collect rent from them. It is not disputed by the Government that treating the persons in occupation of the lands in question as trespassers *B* memos. were issued and kist was collected. The following passage in the affidavit, Exhibit B-9 is important:

> " Action under the Land Encroachment Act has been taken against the shop-keepers and penalty has been collected from them under that Act for faslis 1368 and 1369 but action has not yet been taken to evict them."

The lessees have produced kist receipts only from May, 1963, as seen from Exhibit B-3 to B-7. But in view of the categorical admission on behalf of the Government contained in the affidavit referred to above, it is clear that the Government is collecting kist from faslis 1368. The question whether there was a threat of eviction and whether that threat was sufficient in law to make the tenant attorn to the person putting forward the threat has to be decided upon the facts and circumstances of each case. The Land Encroachment Act provides the procedure to evict persons in unauthorised occupation of Government lands. Under section 3 any person unauthorisedly occupying Government land is liable to pay the full assessment imposed on the land. Under section 5, a person in unauthorised occupation of Government land is liable to pay what is known as penal assessment. Section 6 provides for summary eviction of the person in unauthorised occupation of Government land for which he is liable to pay assessment under section 3. Under section 7, before taking proceedings under section 5 or 6, the Collector or the Tahsildar or the Deputy Tahsildar, as the case may be, should cause to be served on the person reputed to be in unauthorised occupation of land being the property of the Government, a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under section 5 or under section 6. That the Government in the instant case contemplated eviction is not disputed. The question, under these circumstancs, is what is the effect of such a threat held out by the Government. It has been held by a Bench of this Court in *Alaga Pillai* v. *Ramaswami Thevar*[2], that a notice under section 7 of the Land Encroachment Act amounts in law to eviction. It is contended for the Government and the Panchayat that after the lessees received notices under section 7, they did not obtain patta from the Government and that mere payment of kist without

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1. (1908) I.L.R. 31 Mad. 461. 2. (1925) 49 M.L.J. 742, 744 and 745.

obtaining patta would not amount to eviction. This contention cannot be accepted. The decision in *B. Gowrisu* v. *K. Subadramma*[1], on which reliance was placed on behalf of the Government, itself lends support to the view that the payment of kist by the person in possession, to whom notice under section 7 of the Land Encroachment Act has been issued, would be sufficient to entitle him to plead *jus tertii* —*vide* the observation at page 963. Obtaining the patta is not the only mode of attornment. Payment of kist by the lessee in consequence of the notice of threat of eviction and acceptance thereof by the Government are sufficient in law to entitle the tenant to contend that he is in possession under the Government though there may not be the relationship of landlord and tenant between him and the Government. The fact that the Government have not issued a patta may raise the question whether the Government is entitled to contend that the persons who have merely paid the kist will continue to be trespassers. That question does not call for any decision now. But that would not affect the right of the lessees who have paid kist to the Government to contend that the person who originally let them into possession, namely, the panchayat, is no longer entitled to maintain any action against them for eviction or for recovery of arrears of rent.

Both the Courts below held in favour of the Panchayat on the question whether the decision in S.A.No. 297 of 1958 operated as *res judicata* against the lessees from contending that the panchayat is not entitled to collect rent from them. That view does not appear to be correct. The suit, out of which that second appeal arose, was instituted during the subsistence of the authority given by the Government to the Panchayat. That suit was filed when the lease under which possession was given subsisted. That was the basis upon which the decision in the second appeal was given—*vide* Exhibit A-5, certified copy of the judgment in the second appeal. It was on that basis that Jagadisan, J., held that the lessees were estopped under section 116 of the Evidence Act, from disputing the title of the Panchayat from collecting rent. But the rights and obligations of the parties have changed completely after the above adjudication. As already pointed out the Panchayat had no subsisting authority to maintain the suit against the lessees after 1958. There is no bar against the lessees from contending that after 1958 the Panchayat had no right to maintain the suit and the decision in S.A. No. 297 of 1958 cannot operate as *res judicata*. There is, however, one case which stands on a different footing. The Panchayat filed S.C.S.No. 224 of 1961 on the file of the District Munsif, Poonamallee, against one Devaraja Chetti, one of the lessees, to recover arrears of rent for the year 1958-59. Rejecting the defence that the Panchayat had no right to maintain the suit the District Munsif granted a decree. Against that decree, the said Devaraja Chetti filed C.R.P.No. 2282 of 1961. It was contended in revision that the petitioner had to attorn to the Government on account of the issue of '*B*' memos. But Jagadisan, J. held that the mere issue of notice was not sufficient unless there was attornment. It was not proved in that case that the tenant brought about an attornment of payment of kist. It was, therefore, held that the tenant was not entitled to dispute the title of the panchayat under which he admittedly came into possession. In the result, revision was dismissed. A copy of the decision in the revision petition is Exhibit A-8. It is important to note that the period for which that suit was laid was after the expiry of the authority given by the Government to the Panchayat. Devaraja Chetti did not put forward the plea that after the expiry of the authority the Panchayat had no right to maintain the suit. Inasmuch as such a plea was not put forward, which ought to have been put forward, and inasmuch as the ultimate decision went against him holding him liable to pay the rent for the year 1958-59, Mr. M.S. Venkatarama Iyer, appearing in the batch of these cases for the appellant petitioners did not seriously contend that the said decision would not operate as *res judicata* against Devaraja Chetti who is the revision petitioner in C.R.P. No. 1960 of 1964. In this view, it would follow, that C.R.P. No. 1960 of 1964 is liable to be dismissed as being barred by the decision in C.R.P. No. 2282 of 1961.

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1. (1956) An.W.R. 1090 : A.I.R. 1957 A.P. 961.

On behalf of the Government it was contended that even if the Panchayat, for some reason or other, is found to be not entitled to maintain the suits for recovery of arrears of rent, decrees may be passed in favour of the Government, as the Government have stated so by making endorsements on the plaints. There is no merit in this request. From 1958, the Government have been treating the shop-keepers as trespassers and issuing '*B*' memos and collecting kist from them. Even though the Government have not issued an order after 1957-58, stating that the Panchayat should not continue to collect rent from the shop-keepers, it should be inferred from their conduct in issuing *B* memos to the shop-keepers and collecting rent from them, that they did not want the Panchayat to act on their behalf. These suits have not been filed by the Panchayat on behalf of the Government. A man cannot adopt by ratification an act which was not authorised by him at the time and did not purport to be done on behalf of any principal (*Keighley Maxstead and Co.* v. *Durant*[1], and *Raghavachari* v. *Pakkiri Mohamed*[2]). There is therefore no room to import a theory of the panchayat acting as the agent of the Government and the Government ratifying any such act by the Panchayat. The mere endorsement on the plaint by the Government would not nullify the effect of the proceedings taken by them against the shop-keepers. It is not open to the Government to say that decrees may be passed in their favour in these suits. I may also observe that such a request is devoid of grace, for, the Government have treated the shop-keepers as trespassers and collected kist from them and it is hardly fair or just that the same persons should be again called upon to pay rent to the Government. For these reasons, I do not accede to the request made on behalf of the Government that decrees may be passed in their favour in these suits. Whatever right the Government may have should be established in appropriate proceedings which they should institute and no relief could be granted in favour of the Government in these proceedings. However, I wish to make it clear that none of my above remarks about the Government should affect whatever rights the Government may have against the shop-keepers.

In the result, C.R.P. No. 1960 of 1964 is dismissed. All the second appeals and the other civil revision petitions are allowed and the suits out of which those proceedings have arisen shall stand dismissed. The parties are directed to bear their own costs in all the Courts. No leave.

R.M. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P.S. KAILASAM.

Mahali and others .. *Prisoners**

Evidence Act (*I of* 1872), *section* 114, *Illustration* (b) *and section* 133—*Evidence of an accomplice—When could be acted upon—Accomplice—Meaning of—Person who is not a* participis criminis—*If accomplice—Rule of caution, if applicable to such witness.*

It is now well settled law that while under section 133 of the Evidence Act an accomplice can be a competent witness, such evidence to be acted upon should be corroborated in material particulars. This rule of prudence and caution is derived from the principle set out in *Illustration* (b) to section 114 of the Evidence Act.

But this principle pre-supposes that the witness in question is an accomplice in the sense of one who was a *participis criminis*. He should be one who is tarred with the same brush as the accused in the crime though not to the same extent. A person who totally exculpates himself from the crime and says he was only a passive eye witness to the commission of the offence cannot be called 'accomplice' in the strict sense even though the formalities of granting a pardon etc. is gone through before he is called upon to give evidence as an approver.

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1. L.R. (1901) A.C. 240. 2. (1916) 30 M.L.J. 497.

* Referred Trial No. 63 of 1968 and Crl.A.No. 676 of 1968. 1st April, 1969.

Still the principle of prudence and caution applicable to the evidence of an 'accomplice' in the strict sense, will be applicable to such cases also. Even the evidence of a person, who was present with the accused at the time of the commission of the offence, but who completely exculpates himself and does not admit having taken any part whatever in the commission of the offence or in any active or passive preparation for the same, will also have to be corroborated in material particulars before it could be acted upon.

Vemi Reddy Satyanarayanan v. *Hyderabad State* (1956) S.C.J. 382 : A.I.R. 1956 S.C. 379 ; *Hafijuddi* v. *The Emperor*, 38 Crl. W.N. 777, referred.

(Facts of the case analysed—Discrepancies in the evidence and circumstances making improbable the prosecution case pointed out).

R.T. No. 63 *of* 1968 :—Trial referred by the Additional Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore for confirmation of the sentence of death passed upon the said prisoner in Case No. 80 of the Calendar for 1968 on 5th September, 1968.

Crl. A. No. 676 *of* 1968 : Appeal by the prisoners (accused Nos. 1 to 3) against the said sentence of death passed upon each of them in the said case.

C.K. Logadass and *Ramaswami*, for Appellants.

The Public Prosecutor, for State.

The Judgment of the Court was delivered by

Ramakrishnan, J.—Three persons, Mahali, Maran and Palani, Harijans, residents of Hanniyada of Nilgiris were sentenced to death by the learned Sessions Judge of Coimbatore for the offence of murder under section 302 read with section 34, Indian Penal Code, subject to confirmation by the High Court. The Referred Trial is now before us. The condemned prisoners have also appealed and their appeals are also before us.

On the night of 18th February, 1968 it was found by P.W. 2, a watchman that a tank in the Nilgiris near Coonoor which used to receive supply from a dam higher up was not receiving its usual supply of water. The concerned authorities of the Water Works Department ultimately traced the block in the flow of water to a dead body wedged into the outlet hole of a "break pressure tank" which is shown in the rough sketch, Exhibit P-18 prepared by the police during the investigation. This break pressure tank is a rectangular structure, $7\frac{1}{2}' \times 3\frac{1}{2}'$ with a depth of 7.3". The inlet pipes and outlet pipes are so placed that a depth of 6' of water is maintained. The tank is covered with R.C.C. Slabs 7 in number laid one by the side of the other. P.W. 1, Ebben Samuel, Commissioner of Coonoor Municipality, was present at the time when the block by means of the dead body which was partially hanging from the over-flow pipe was removed. When the covering slabs were removed another dead body with its hands and legs tied was found in the same chamber. Subsequent post-mortem examination showed that these two persons had met with their death by asphyxia due to drowning. The well-known tests for such asphyxiation like the section of the lungs exuding watery frothy mucus and similar other symptoms were clearly present. There is little doubt that these two unfortunate persons met with a watery grave in the small confined space of the break pressure tank above mentioned. The post-mortem doctor fixed the time of occurrence as 24 to 48 hours prior to the post-mortem examination which was held on the 20th morning by the Civil Assistant Surgeon of the Lawley Hospital, P.W.16. The prosecution case was that the death took place on the night of 18th February, 1968.

The villagers gathered near the scene where the dead bodies were found, one Palaniyal identified the bodies as those of two Harijans, Subban and Bethan, who were brothers. They will be referred to for the sake of reference as D-1 and D-2 in this judgment.

The prosecution has given an account of the motive for the occurrence. D-1 and D-2 and one Velan are the sons of P.W. 4. Velan is married to one Palanal, P.W. 8,

a girl aged 15 years. About ten days before the occurrence when P.W. 8 was near the water tap accused 1 wanted to drag her into conversation. She protested; for this action her father-in-law P.W. 4, scolded accused 1 as well as accused 2 whereupon accused 1 replied that he would do something to the family of P.W. 1 within eight days. The point to note is that accused 2 was not present when accused 1 tried to drag P.W. 8 into conversation. Secondly accused 3 is not at all associated with this motive. Accused 1 and 3 and the approver, P.W. 5, Raju are all young Harijans and also residents of Hanniyada.

Regarding the actual incident, the approver, P.W. 5, Raju, alone has given evidence. P.W. 5 accepted the invitation of accused 1 on the evening of 18th February, 1968 to attend a cinema. On the way they were joined by accused 2 and 3. They were proceeding along the Coonoor Road evidently to go to Coonoor for the cinema. Apparently Subban, D-1 also used to joint these young people on similar occasions in the past. When P.W. 5 asked whether D-1 was going to join them that evening accused 1 is said to have told P.W. 5 that a week previously D-1 had abused him and threatened to beat him with chappal and that he (accused 1) was going to question D-1 about it. At or about this time D-1 and D-2 left their house to go to Bandhumi Village. It was the practice of D-1 and D-2 to graze the cattle of a Bandhumi villagers and collect food from the villagers every night by way of remuneration. It was for that purpose that D-1 and D-2 left their house on the night of 18th February, 1968 with a tiffin carrier M.O.2. One of them was wearing chappals and was having a bed-sheet covering their head. Their route lay along the Coonoor road. Near a culvert which is marked on the sketch mentioned above D-1 and D-2 met the party comprising of P.W. 5 and accused 1 to 3. A quarrel ensued between them and accused 1 proposed that to resolve the quarrel D-1 should go to a Mahakali temple which is also shown in the sketch away from the Coonoor road for the purpose of taking an oath. That temple is about 2 miles from the place where according to the approver the conversation took place. P.W. 9, Natesan, who was returning to his house in Bandhumi village, saw the party of the deceased as well as the accused and P.W. 5 near the culvert at about 8 P.M. They were simply talking; P.W. 9 did not notice any evidence of a quarrel. At first, according to the approver D-1 refused to go to the temple indicated by the accused, and wanted to go to another temple instead, and finally on the pressure of accused 1, D-1 accepted accused 1's suggestion. They proceeded from the culvert for a distance of about 1½ miles and the break pressure tank was near the place which they reached by that time. Then suddenly accused 2 snatched the tiffin carrier from D-2, accused 3 caught hold of D-2 and accused 1 and 2 pushed D-1 down. Accused 1 pressed him; accused-2 tied his hands and legs with the mufflers of accused 2 and 3. Then accused 1 and 2 pulled the muffler round the neck of D-1 with a view to strangle him; D-1 fainted. Then accused 1 and 2 tied the hands of D-2 behind the back with his muffler. Then all the accused removed the covering slabs of the tank and threw both D-1 and D-2 into the tank and closed it with the slabs. They threatened P.W. 5 not to divulge what he had seen to any body, took him to the temple and made him to swear on oath to keep the matter secret. The lid of the tiffin carrier was thrown there and the chappals also were thrown nearby.

As to what the accused and P.W. 5 did thereafter there is evidence. The three accused came to the house of P.W. 12 at about midnight, told him that they had been to the cinema and wanted to sleep at his place. They did so P.W. 11, Doraisami, deposes that the usual practice followed, was for P.W. 5 and accused 1 to 3 to sleep in the house of the uncle of P.W. 11 every night. But they did not do so on the night of 18th February, 1968. The above are the broad details as to the circumstantial evidence as well as the evidence of the approver, for connecting the accused with a very heinous crime. The accused pleaded not guilty to the occurrence and did not examine any defence witnesses.

Leaving apart for a minute the evidence of the approver, P.W. 5, which we shall presently refer to in some more detail, the rest of the evidence which is circum-

stantial is not sufficient to bring home the guilt of the accused beyond reasonable doubt. To begin with, the motive which arose out of a quarrel near the water tap between accused 1 and the deceased's sister-in-law appears to be hardly sufficient for a planned scheme of murder. Even in this quarrel near the water tap accused-2 is not a participant. It is accused 1 who is said to have given a threat to do something to the family of P.W. 4. Accused 2 is not associated with the threat. Accused 3's name is not at all mentioned as one concerned in the motive.

Taking the association of the deceased and the accused prior to the occurrence and at places proximate to the scene of occurrence, leaving apart for a minute the evidence of the approver, P.W. 5, P.W. 9 says that at 8 P.M. he saw the accused in the company of the deceased and P.W. 5 at a culvert at the Coonoor Road. But this culvert is 1½ miles from the scene of occurrence. A reference to the sketch shows that a foot-path leads for a considerable distance from the culvert to the break pressure tank. It is significant P.W. 9 did not notice any angry words exchanged between the two groups of people. According to him they were merely standing and talking. Regarding the incidents after the occurrence there is only inadequate evidence. According to P. W. 11 it was the usual practice of the accused and P.W. 5 to sleep in the house of one Thadi Karuppan, the uncle of P.W. 11. P.W. 11 is a small boy aged 10 years. He states that on the particular night, 18th February, 1968, accused and P.W. 5 did not come to Thadi Karuppan's house for sleep. The evidence of P.W. 12 is that the accused slept in his house giving the reason that they had gone to a cinema. It is a perfectly plausible reason. It does not point to an inevitable inference that these three persons participated in a murder in the meanwhile.

Now we will take up the evidence of the approver, P.W. 5. He is related to accused 1 and 3, being a first cousin. According to his evidence he was a passive spectator of the incidents near the break pressure tank, when accused 1, 2 and 3 murdered the deceased. He was arrested along with the other accused on the 20th of February, two days after the occurrence. He was kept in the lock up. Thereafter to the police he gave for the first time the present version of the occurrence. Then he was taken to the Sub-Magistrate, Ootacamund, and before the Sub-Magistrate also he gave the statement which was recorded under section 164, Criminal Procedure Code, on 13th March, 1968. There also he has given the broad details of the occurrence in the manner he had given in Court. No doubt there are certain contradictions between the earlier statements and the version of P.W. 5 in Court, to which we shall briefly refer to. But the point to remember is that in all these statements he had completely exonerated himself from any blame in the matter and claimed to have been only a passive spectator.

The question which arises therefore is whether in such circumstances, P.W. 5 could be properly considered as an accomplice for the purpose of section 133 of the Evidence Act. That section lays down that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. While section 133 of the Evidence Act lays down the above position of law, it has been long recognised that as a rule of prudence and caution, the testimony of an accomplice should be corroborated in material particulars, 'material particulars' for this purpose meaning evidence which will have relevancy both to the crime as well as to the criminal. This rule of prudence and caution is derived from the principle set out in illustration (*b*) to section 114 of the Evidence Act, that a Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This presumption pre-supposes that the witness in question is an accomplice in the sense of one who has assisted the accused in the crime in some way so that he is "tarred with the same brush" as the other accused persons, though not to the same extent. It is usual in such circumstances to rule out for the purpose of treatment as an accomplice a person who totally exculpates himself. The further question that arises is whether the same rule as to corroboration that is required in the case of an accomplice who turns approver and gives evidence for the prosecution should be insisted upon in the

case of a person whose evidence discloses that he is not an accomplice at all. In such cases, apart from the provision in section 133 and the presumption in *Illustration* (b) to section 114 of the Evidence Act, prior decisions have laid down that the principle of caution and the requirement of corroboration on material particulars should also be applied if the circumstances call for it.

Thus in *Vemi Reddy Satyanarayanan* v. *Hyderabad State*[1], the concerned witness was P.W. 14 who took no part whatever in the commission of the offence or in any active or passive preparation for the same. He was not a *participis criminis*. After securing his release from his temporary masters he went away with his father to his village. He did not divulge the secret of the murder to any one except his own father. The Supreme Court observed that though he was not an accomplice the Court would still want corroboration on material particulars as he was the only witness to the crime and as it would be unsafe to hang the accused on his sole testimony unless the Court was convinced that he was speaking the truth.

In *Hafijuddi* v. *The Emperor*[2], it is observed :

> " So far as the statutory provisions are concerned, there is nothing in law to justify the proposition that evidence of a witness, who happens to be cognisant of a crime, or who made no attempt to prevent it, or who did not disclose its commission should only be relied on to the same extent as that of an accomplice. The real question in such a case is the degree of credit to be attached to the testimony of such a witness; and that depends on all the facts and circumstances of the particular case."

In the present case P.W. 5 had been made to go through all the formalities of grant of pardon, before he was called on to give evidence at an approver. It is a mystery to us why all these formalities were adopted in his case, even though from the very beginning he has not implicated himself in any manner in the occurrence and claimed to be only a direct eye witness. There is further evidence that he along with accused-1 assisted other people in carrying the dead bodies to a safe place after they were discovered in the tank on 19th February, 1968. It is only after he was arrested along with the other accused, and taken to the police lock up and kept there for some time, that he came with the version of his having been an eye witness. The version itself was given on the 20th, two days after the occurrence. The belated appearance of his testimony will be a strong circumstance which will require independent corroboration of his testimony. Secondly there are several intrinsic improbabilities and suspicious features in what he has deposed. All the three accused are young people, their ages ranging between 18 and 20. The two deceased also are 19 and 17 years of age. P.W. 5 wants us to believe that without any struggle or resistance D-1 and D-2 allowed themselves to be tied up by three other young men and then hurled into the break pressure tank. These young Harijans would have strongly resisted and inflicted some injuries on the bodies of their assailants at least nail marks and the like, in the ordinary circumstances. But according to P.W. 5 none of these things happened. To say the least this is improbable as well as surprising. P.W. 5 would go to the extent of saying that none of the deceased raised shouts. In Sessions Court he said that D-1 Subban did not shout because he was unconscious. But before the police he stated that D-1 shouted. In any event there is no reason why D-2 should not have shouted. In the Sessions Court P.W. 5 mentioned that accused 1 and 2 attempted to strangle D-1. But to the police, P.W. 5 did not mention anything about this attempt to strangle D-1. To the police P.W. 5 did not mention that D-1 became unconscious. In the Sessions Court he said that D-1 became unconscious and therefore did not shout. There are several other discrepancies as to the manner in which the actual occurrence took place between the evidence of P.W. 5 in Court and his earlier statements. The learned Sessions Judge was of the opinion that these are not

1. (1956) S.C.J. 382 : (1956) S.C.R. 247 : A.I.R. 1956 S.C. 379.
2. 38 Cal.W.N. 777.

material discrepancies. We are unable to agree. Considering the fact that we are required to accept the evidence of P.W. 5 that two apparently healthy young men allowed themselves to be tied and thrown into the tank without any struggle or protest by three other young men, these discrepancies in the evidence of P.W. 5, assume significance. Along with this we should take into account the fact that though P.W. 5 did not inculpate himself to all intents and purposes he was treated as an approver. Pardon was given to him and he was kept under arrest throughout, even during the time of his giving evidence. He was therefore acting under strong pressure to give evidence according to a particular pattern. Further, the occurrence took place on the night of the 18th. From the morning of 19th P.W. 5 was present along with the other villagers. It was not till the 20th two days later, that he came forward with the present version. These are circumstances which are very strong infirmitive features in his testimony. It is therefore necessary to look for independent corroboration, both as to the crime and criminal before we could accept his testimony for convicting the accused. We have referred to the circumstantial evidence in the earlier part of the judgment and expressed our conclusion that they are not sufficient to connect the accused with the crime. There was also evidence about the recovery of some items of property of the deceased persons on the information supplied by P.W. 5. This evidence about the place wherefrom M.Os. 11 and 12 were recovered, places where the tiffin carrier and chappals worn by one of the deceased were recovered on the information furnished by P.W. 5 would amount to an awareness on the part of P.W 5 of the places where these articles were concealed or thrown. But they cannot provide circumstantial evidence for connecting the particular accused with the particular offence with which they are charged. The requirements of prudence and caution make it necessary for the prosecution to supply such evidence in this case. This has not been done.

For the aforesaid reasons we are of the opinion that the evidence of the "approver", P.W. 5, is not in itself reliable and safe to be acted upon, that it requires material corroboration both as regards the crime and the criminal, but the rest of the evidence does not afford such corroboration.

We therefore find the accused not guilty and acquit them and direct them to be set at liberty.

R.M. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Chief Justice.*

R. Kandaswami and others .. *Petitioners**

v.

R. Thirugnanasambandam and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 22, *rule* 1—*Suit for malicious prosecution—Death of defendant* pendente lite—*Suit if abates.*

Maxim—"Actio personalis moritur cum persona"—*Scope.*

Where the defendant dies pending a suit for damages for malicious prosecution, the right to sue does not survive within the meaning of Order 22, rule 1, Civil Procedure Code. In other words, the right of suit cannot be continued against the legal respresentatives of the wrong-doer. To such a case the principle of *actio personalis moritur cum persona* applies. It is only where the estate of the deceased wrong-doer has benefitted from the wrongful act, in any manner, in any form of enlargement, that the original action can be continued notwithstanding the death of the defendant.

Rustomji Borabji v. *Nurse*, (1921) I.L.R. 44 Mad. 357 : 40 M.L.J. 173, followed.

*C.R.P. Nos. 776 and 777 of 1967. 11th April, 1969.

Petitions under section 115 of Act V of 1908, praying the High Court to revise the order of the IV Assistant Judge, City Civil Court, Madras, in I.A. No. 4425 of 1966 in O.S. No. 3463 of 1963, etc.

V. Thyagarajan for *S. Nainar Sundaram*, *V. Natarajan* and *Rajendran*, for Petitioners.

G. T. Ramanujachari, for Respondents.

The Court made the following

ORDER.—These two revision petitions involve a point of some interest, but upon which, there are clear authorities of this Court available deciding the issue. Very briefly stated, the facts are that, in both these revision petitions, the concerned party was attempting to obtain damages for what was essentially a malicious prosecution, *viz.*, a malicious attempt to obtain the adjudication of the concerned plaintiff as an insolvent, which, for the time being at least, succeeded. In each of these cases, the averment were that the concerned petitioning-creditor was not acting *bona fide* but was acting with malice and without due cause for the alleged ground relied on as an act of insolvency, in order to get the concerned debtor adjudicated, thereby inflicting considerable injury and humiliation upon him. In each of these cases, which in substance was an action for damages for the injury inflicted by malice on a person, of course, in the wide sense, and not merely in the sense of a physical injury, the concerned defendant (wrong-doer) died *pendente lite*. The simple question is, whether the action can be continued against the legal representatives of the wrong-doer with regard to the assets of the wrong-doer that might be in their hands.

This matter came up for decision in *Rustomji Borabji* v. *Nurse*[1], and it was held by the Full Bench that where the defendant dies before judgment is given in a suit for damages for malicious prosecution, or a malicious act, the right to sue does not survive within the meaning of Order 22, rule 1, Civil Procedure Code. In other words, the right of suit cannot be continued against the legal representatives of the wrong-doer, with regard to the assets of the wrong-doer in their hands. The expression 'personal injuries not causing the death of the party' in section 89 of the Probate and Administration Act, which is also to be found in section 306 of the Indian Succession Act, did not imply injuries to the body merely, "but all injuries" which do not necessarily cause damage to the estate of the person wronged."

In laying down the law, on the subject, Kumaraswami Sastriar, J., referred to the maxim "*actio personalis moritur cum persona*" and also to *Phillip* v. *Homfray*[2]. The dicta of Lord Bowen were quoted to the effect that the only case in which a remedy for a wrongful act could be pursued against the estate of the deceased person who has done the act, is the case where that estate has been swelled by the proceeds of the injurious or mischievous action. The learned Judge (Kumaraswami Sastriar, J.) said.—

> "When there is nothing amongst the assets of the deceased that in law or equity belongs to the plaintiff and the damages which have been done to him are unliquidated and uncertain, the executor of a wrong-doer cannot be sued merely because ....an indirect benefit may have been reaped thereby."

There is no doubt whatever that, as far as this Court is concerned the judgment of the Full Bench is binding and that it continues to be the law. In *Palaniappa Chettiar* v. *Raja of Ramnad*[3], it was held that a suit for damages for malicious prosecution of the plaintiff abated on his death. That, of course, is the converse case, but it seems to me to be clear that the principle *actio personalis moritur cum persona* applies with even greater force to the case where it is the defendant who dies *pendente*

1. (1921) I.L.R. 44 Mad. 357 : 40 M.L.J. 173.
2. (1883) 24 Ch.D. 439.
3. (1926) I.L.R. 49 Mad. 208 : 50 M.L.J. 34.

liré, and the legal representatives of the wrong-doer are sought to be made answerable to a claim arising from a personal injury committed by the defendant alone. In *Mahtab Singh* v. *Hublal*[1], the same principle was affirmed and *Rustomji Dorabiji Nurse*[2], has been referred to. The text of *Phillips* v. *Homfray*[3], has also been made available, and, the true limit and meaning of the rule that a personal action dies upon a defendant's death has been carefully enunciated in this decision. It is where the estate of the deceased wrong-doer has benefited from the wrongful act, in any manner, in any form of enlargement, that the original action can be continued notwithstanding the death of the defendant.

Learned Counsel for the respondents has largely relied upon a passage in Paton's jurisprudence, 3rd edition, page 355, wherein, the author observes that the common law rule *actio personalis moritur cum persona* was modified by a series of exceptions and left only as almost a vestige by the Law Reform (Miscellaneous Provision) Act, 1934. But, I am unable to follow why that state of affairs, which prevails in the United Kingdom by virtue of a specific enactment, should be brought into the picture here and applied to the present situation. In *Bhupendra* v. *Chandramani*[4], a Division Bench of the Calcutta High Court in one part of the judgment observed that the doctrine of *actio personalis moritur cum persona* is not part of the law in India, and, in any event, the learned Judges felt inclined to hold that a cause of action for negligence, in the circumstances of that particular case, fell clearly within the rule of survival. But, in *Arunachala* v. *Subramania*[5], Rajamannar, C.J., referred to *Bhupendra* v. *Chandramani*[4], in the particular context of the discussion of the *actio personalis moritor cum persona* rule, and pointed out that the statement of Page, J., appeared to be very wide, and that there were qualifying passages elsewhere.

The true construction, obviously, is that already enunciated by our Full Bench, to which I have referred. I have carefully gone through the pleadings, in these two cases, and, substantially they amount to averments of considerable personal injury inflicted on each plaintiff by the malicious act of obtaining an adjudication in insolvency. The damages are not related, *per se*, to any injury to the estate of the person wronged, and, on the contrary, the damages are broadly claimed, without any specific demarcation related to any property, loss, as damages for personal injuries sustained by the malicious prosecution. The Full Bench decision is the authority for this view that such an injury need not at all be a bodily injury and hence, I am of the opinion that these suits would fall within the excepted matters in section 306 of the Indian Succession Act. In any event, there is not a little of evidence in support of the criterion laid down by Kumaraswami Sastriar, J., in the Full Bench decision referred to.

Even if the vesting of the estate in the Official Receiver, for sometime, caused some conceivable injury, which also affected the property of the person wronged, there is not the slightest averment that a dividend was declared or that anything was done by which the wrong doer materially benefitted or by which the assets of the wrong doer were enhanced. Had there been such evidence, or, even if the enhancement or enlargement has been minimal or marginal, I would have been inclined to hold that, on facts of that character, there may be a possibility of continuing the action against the legal representatives. But, there is not the slighest iota of such evidence, and hence, following the Full Bench and the case law relevant to this respect, I am of the view that, on the facts of these two cases, the action cannot be continued against the legal representatives of the deceased defendant either by the plaintiff or by his legal representatives. I must add that in one of the two cases, it is reported that the plaintiff is also dead.

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1. (1926) I.L.R. 48 All. 630.
2. (1921) I.L.R. 44 Mad. 357 : 40 M.L.J. 173.
3. (1883) 24 Ch.D. 439.
4. A.I.R. 1927 Cal. 277.
5. (1957) 2 M.L.J. 537: A.I.R. 1958 Mad. 142.

The final question that has been agitated is whether the matter should not be left to the trial of the suit, or suits, after impleading the representatives or whether it should be decided now under Order 22, rule 1, Civil Procedure Code. I think that there will be considerable uncertainty if the matter is not now decided, and, I am unable to see any justification for postponement of the decision. Order 22, rule 1, Civil Procedure Code, is very clear that if the right to sue does not survive, or the right to be sued does not survive, the suit abates either on the death of the plaintiff or the defendant, as the case may be. Since the suits abate, in these cases, there can be no justification for postponement of the decision.

I allow the revisions, hold, that the suits abate, and dismiss them accordingly. In the particular circumstances of these cases, parties will bear their own costs.

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM AND MR. JUSTICE K. S. VENKATARAMAN.

S. V. K. N. Palaniappa Chettiar .. *Appellant**

v.

V. R. P. L. M. Palaniappa Chettiar and others .. *Respondents.*

Transfer of Property Act (IV of 1882), Clause 4 of proviso (c) to section 73 (1)— Scope—Mortgage—Claim of simple money decree-holder, if will have priority over that of second mortgagees.

On the question whether the claim of subsequent encumbrancers (second mortgagees) will have preference over that of a simple money decree-holder, *held*, that, the fourth clause of the proviso (*c*) of section 73 (1) of the Transfer of Property Act providing for rateble distribution of the simple money decree-holders on the judgment-debtors would come into play only if there was some money after satisfying the claim of the subsequent encumbrancers.

Appeal against the decree and judgment of the Court of the Subordinate Judge of Madurai, dated 2nd January, 1965 in E.A. No. 12 of 1964 in E.P. No. 15 of 1958 in O.S. No. 96 of 1943.

K. S. Ramachandra Aiyar and *R. Srinivasa Iyengar*, for Appellant.

V. Vedanatachari and *A. Venkatesan*, for Respondents.

The Judgment of the Court was delivered by

Venkataraman, J.—This is an appeal against the order dated 2nd January, 1965 of the learned Subordinate Judge, Madurai, dismissing the application E.A. No. 12 of 1964 in E.P. No. 15 of 1958 in O.S. No. 96 of 1943 which the appellant filed calling upon respondents 1 to 4 in the petition and in the appeal to re-deposit the amount of Rs. 18,289-24 which they had drawn out. The facts have been fully stated in the judgment under appeal and it is enough to mention the following facts. One Rayaloo Iyer and Company had a mortgage over five items of properties, dated 14th September, 1921. It obtained a decree in O.S. No. 75 of 1934 which was duly confirmed in appeal. In execution it brought item I of the hypotheca to sale on 15th January, 1956 for Rs. 24,000. The decree in O.S. No. 75 of 1934 was fully satisfied and there remained a surplus amount of Rs. 19,595-8-10. In the said suit the predecessor-in-title of the respondents 1 to 4 herein was impleaded as the third defendant because he held a subsequent mortgage, dated 9th January, 1926

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*A.A.O. No. 62 of 1965. 11th September, 1969.

over those five items and another item. He filed his own suit O.S. No. 91 of 1938 to enforce the mortgage and obtained the usual preliminary and final decrees. Respondents 1 to 4 had filed an execution petition in enforcement of their mortgage decree in O.S. Mo. 91 of 1938; and it was during the pendency of that execution petition, the earlier sale in O.S. No. 75 of 1934 took place. The Court ordered even in O.S. No. 75 of 1934 that the subsequent mortgagee, the third defendant therein would be entitled to the surplus sale proceeds after satisfaction of the first mortgagee's claim. In pursuance of this direction, the respondents filed E.A. No. 282 of 1956 in O.S. No. 75 of 1934 for payment to them of the sum of Rs. 19,595-8-10 representing the substituted security for item 1 in their capacity as second mortgagee decree-holders. That petition was dismissed on 22nd July, 1956 on the ground that they should work out their rights in execution of their mortgage decree in O.S. No. 91 of 1938.

On 27th July, 1956 they filed an application in E.A. No. 645 of 1956 in E.P. No. 349 of 1955 in O.S. No. 91 of 1938 to send for the sum of Rs. 19,595-8-10 from O.S. No. 75 of 1934 being their substituted security. The petition was ordered on 6th October, 1956 (the dated 6th September, 1958 appearing in the printed copy of judgment under appeal is a mistake for 6th October, 1956). The learned Judge overruled some objections taken by the judgment-debtors mortgagors about the E.P. being time barred and finally on 18th April, 1958, ordered the issue of a cheque in favour of the respondents for the sum of Rs. 18,289.24.

Before the cheque was issued, the appellant herein got the said amount attached in his own E.P. No. 15 of 1958 in O.S. No. 96 of 1943. The attachment was made on the footing that the money belonged to the judgment-debtors. The appellant is a simple money decree-holder. The attachment was on 12th July, 1958.

The actual money which was sent for to the credit of O.S. No. 91 of 1938 was paid to the respondents 1 to 4 as ordered by the learned Subordinate Judge. Thereafter, the appellant filed E.A. No. 12 of 1964 out of which this appeal arises for directing the respondents 1 to 4 to re-deposit the said amount. The said application has been dismissed by the learned Subordinate Judge and it is against that order the present appeal has been filed.

The main reason given by the learned Subordinate Judge for dismissing the application of the appellant is that the respondents 1 to 4 are entitled to the amount in question as substituted security in place of their rights as second mortgagees and that their claim will obviously have preference over that of a simple money decree-holder like the appellant. This reasoning obviously in sound and is borne out by the provisions of section 73 (1), provision (*c*), Civil Procedure Code, which runs in these terms:

> "Where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree;
>
> thirdly, in discharging the interest and principal monies due on subsequent incumbrance (if any); and
>
> fourthly, ratably among the holders of decrees for the payment of any money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of decrees, and have not obtained satisfaction thereof."

It will be noted that the sale in O.S. No. 75 of 1934 took place in discharge of the incumbrance therein and after satisfying the expenses of the sale and the amount due under that decree there remained a surplus and under the third clause of the proviso (*c*), the respondents 1 to 4 being the subsequent encumbrancers (second mortgagee) would be entitled to the amount; and only if there was some money left after satisfying their claim, the fourth clause of the proviso (*c*) providing for ratable

distribution for the simple money decree-holders of the judgment-debtor would come into play. The appellant will come only under the fourth clause. Hence the order of the learned Subordinate Judge is correct. Having regard to the wording of section 73 which after all only embodies the substantive law that a mortgage will take priority over a simple money creditor. Otherwise, the whole object of a mortgage would be defeated. The doctrine is pointed out by a Bench of this Court in *Shanmugham Chettiar* v. *Palaniappa Chettiar*[1], that where the hypotheca is sold, the security will fasten itself on the sale proceeds which come by way of substituted security.

The learned Counsel for the applicant has no effective answer to this contention. He argued the appeal on the footing that the attachment of the amount by his client took place on 12th July, 1958, and that the money was sent for to the credit of O.S. No. 91 of 1938 only on 6th October, 1958 and that since the attachment was prior to the order dated 6th October, 1959, that order cannot be availed by the respondents 1 to 4. But it has been pointed out to us that 6th October, 1948 is a mistake for 6th October, 1956; and we have satisfied ourselves on that point. That is also another reason why the argument of the appellant has to fail. The learned Counsel for the appellant urged that there were special circumstances in this case. We are unable to find any special circumstances, particularly to overcome the effect of section 74 (1), proviso (*c*).

In the result, the appeal fails and is dismissed with costs—one set.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Thangammal (died) and others .. *Appellants**

v.

Murugammal and others .. *Respondents.*

Presidency Small Cause Courts Act (XV of 1882), section 28—Scope—Execution of any decree of the Small Cause Court—Superstructure deemed movable property—Effect—Superstructure, if ceases to be movable property, after vesting in the auction purchaser.

Both under the Transfer of Property Act and the General Clauses Act, as a thing attached to earth the superstructure would be immovable property. But the Presidency Small Causes Court Act makes a departure and statutorily requires the superstructure to be regarded as movable property. Section 28 of the Act clearly provides that for the purpose of execution under any decrees of the Small Causes Court, the superstructure of a tenant of immovable property shall be deemed to be movable property.

When the Legislature provides that something shall be deemed to be other than what it is, having deemed it so, one cannot stop half way, when it comes to the inevitable corrolaries of that state of the things. The deeming shall be continued to the realisation of the purpose for which it is to be so deemed. Clearly vesting of the property in the purchaser is not the be all and end all of the execution proceedings. He has purchased the superstructure in execution of the Small Causes decree and it is deemed to be movable property, because, before the termination of his tenancy the tenant may lawfully remove the superstructure without the permission of his landlord. Section 28 provides that the property sold in execution may be severed by the purchaser, but that it shall not be removed from the immovable property until he has done to the property whatever the judgment-debtor would have been bound to do it if he had removed such thing. The section contemplates not only attachment and sale but also severance of

1. I.L.R. (1964) 2 Mad. 101 : 78 L.W. 44.

*S.A. No. 137 of 1965. 12th September, 1969.

the property by the purchaser. The deeming provision or fiction continue till the thing is severed and possession is secured by the purchaser. It follows that the superstructure sold under section 28 of the Act is movable property and the auction purchaser has title to the superstructure not as immovable property but as moveable property. There is no distinction between questions arising 'in' and questions arising 'out of' execution of a Small Causes decree.

Appeal against the Decree of the City Civil Court (Additional Judge) Madras in Appeal Suit No. 266 of 1963 preferred against the decree of the City Civil Court (First Asst. Judge) Madras in Original Suit No. 940 of 1959).

S. Amudachari, *A. V. Raghavan* and *S. Balasubramaniam*, for Appellants.

V. Ganapathisubramania Iyer, for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal raises an interesting question in the application of section 28 of the Presidency Small Cause Courts Act, 1882. Defendants 3 to 5 are appellants in the second appeal. The suit property is the superstructure of premises in Jagannathapuram, Second Street, Chetput, Madras. Defendants 2 and 3 in the suit instituted S.C. No. 1560 of 1940 on the file of the Court of Small Causes, Madras, for the ground rent due by one Ponnuswami, the then owner of the superstructure, and, in pursuance of the decree passed by the Court of Small Causes on 28th April, 1940, they attached the superstructure and put it up for sale under section 28 of the Act. The superstructure was purchased by one Jayaram Naidu and a sale certificate Exhibit B-11, dated 14th November, 1942 was issued in his favour. Subsequently in May, 1945 Javaram Naidu sold the superstructure to the present 1st defendant P. S. Sarma. The 1st defendant, for securing possession of the property instituted the suit O.S. No. 1994 of 1954 on the file of the City Civil Court, Madras, against Ponnuswami's son Muniswami alleging that Muniswami was continuing in possession after the death of his father Ponnuswami. Muniswami resisted the suit. But his defences were overruled and the suit ended in a decree for possession of the superstructure in favour of the plaintiff in that suit, the present 1st defendant. The execution of the decree was stayed for one year. Thereafter, when proceedings in execution were taken by the present 1st defendant, the plaintiffs in the suit out of which the second appeal arises offered obstruction. The 1st plaintiff is the wife of Muniswami and plaintiffs are his sons, that is, the grandsons of Ponnuswami. They asserted their possession of the superstructure and claimed title to the same by virtue of registered settlement deed executed in their favour by Ponnuswami on 28th January, 1944. An application for removal of obstruction filed by P.S. Sarma, was allowed on 13th September, 1958 and it is to set aside the order directing the removal of obstruction and to declare their title to the superstructure that the present suit was filed by the plaintiffs. Originally Sarma was the party defendant. The 2nd defendant came on record as purchaser of the superstructure from Sarma on 6th February, 1959. On the death of the 2nd defendant his legal representatives were brought on record as defendants 3 to 5.

The Courts below have concurrently held that the plaintiffs cannot claim any title to the property under the settlement deed. Ponnuswami had lost title to the suit property by the Court sale evidenced by the sale certificate Exhibit B-11 even in 1942. He had no right, title or interest in the property subsequent to the Court sale, to pass title to the plaintiffs. The trial Court examined the question of title to the land, though that was not in issue in the proceedings. The summary order whose validity was impugned in the suit, related only to the superstructure. The trial Court, on its view of the law and having regard to the finding as to the invalidity of the settlement deed, dismissed the suit with costs. On appeal, the learned Additional City Civil Judge has decreed the suit as prayed for with costs, making it clear that the adjudication is only in respect of the superstructure and not in respect of the site on which the superstructure stands.

The substantial claim of the plaintiffs is that the title of the 1st defendant to the superstructure had become extinguished by the law of limitation, before possession was attempted to be taken from them. It was contended for the plaintiffs that what was sold in the Court auction to the auction purchaser Jayaram Naidu was movable property, the superstructure. As movable property, the right to secure possession thereof must be exercised within three yars of vesting of title in the property. In the present case, so far as the plaintiffs are concerned, they were not parties to the suit O.S. No. 1994 of 1954 instituted by the present 1st defendant. The decree in that suit was against Munisami. The present plaintiffs claim and assert title to the suit property independent of Muniswami. The submission on behalf of the plaintiffs was that it may be that they have no legal title to the superstructure under the settlement deed, but that they have perfected their title to the same by prescription, the 1st defendant's right to claim possession thereof having become barred by limitation. It was also contended that the decree in O.S. No. 1994 of 1954 cannot be executed against the plaintiffs, they being not parties to the same. The learned Additional City Civil Judge accepted the contentions of the plaintiffs and decreed the suit.

Of course, what was sold in execution of the decree in S.C.No. 1560 of 1940 was the superstructure on the land. Both under the Transfer of Property Act and the General Clauses Act, as a thing attached to earth the superstructure would be immovable property. But the Presidency Small Cause Courts Act makes a departure and statutorily requires the superstructure to be regarded as movable property. Section 28 of the Act which provides for it runs as follows :

> "When the judgment-debtor under any decree of he Small Cause Court is a tenant of immovable property, anything attached to such property and which he might before the termination of his tenancy lawfully remove without the permission of his landlord shall, for the purpose of the execution of such decree and for the purpose of deciding all questions arising in the execution of such decree, be deemed to be movable property and may, if sold in such execution, be served by the purchaser, but shall not be removed by him from the property until he has done to the property whatever the judgment-debtor would have been bound to do to it if he had removed such thing."

Section 28 of the Act clearly provides that for the purpose of execution under any decree of the Small Cause Court, the superstructure of a tenant of immovable property shall be deemed to be moveable property. It has to be attached and sold as movable property and all questions arising to the same in the execution of the decree of the Small Cause Court have to be disposed of as if it is moveable property. Certain restrictions are imposed with reference to severance of the property on the purchase in execution. Rules have been framed under the Act called the Rules of the Presidency Court of Small Causes 1912 on the model of the Rules in the Civil Procedure Code. Several sections in the Civil Procedure Code are made applicable to the Act. Order 21, rule 5 of the Rules states that every application for the execution of a decree shall contain *inter alia* the mode in which the assistance of the Court is required : whether (*i*) by the delivery of any property specifically decreed ; (*ii*) by the attachment and sale, or by the sale without attachment, of any property; (*iii*) by the arrest and detention in prison of any person ; (*iv*) by the appointment of receiver ; and (*v*) otherwise, as the nature of the relief may require. Order 21, rule 41 provides for attachment of the property mentioned in section 28. Order 21, rule 63 provides that, in the case of the property mentioned in section 28 of the Principal Act, the Court may direct the sale to be held at or near the said property, or at such other place as to the Court may deem fit. Order 21, rule 68 provides that, where the property sold is moveable property of which actual seizure has been made it shall be delivered to the purchaser. Order 21, rule 70 states that, in the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly. In the present case, the sale certificate Exhibit B-11 has been issued under Order 21, rule 70 declaring the purchaser as the highest bidder and stat-

ing that the property has vested in him. What is contended for the defendants is that it may be that, for the purpose of attachment and sale, the Act has provided for the superstructure being treated as moveable property, but that it does not lose its character as immovable property under the Transfer of Property Act and the General Clauses Act. Once the superstructure has become vested in the purchaser it is said, the process of execution comes to an end and thereafter the superstructure must be deemed to be immovable property. Learned Counsel would contend that, being immovable property, it is perfectly open to the purchaser to sue for possession of the property within 12 years of suit under Article 137 or Article 138 of the Limitation Act. The learned Additional City Civil Juge has not accepted this contention and he points out that Article 137 and 138 deal with suits by a purchaser at a sale in execution of a decree for possession of immovable property. The present 1st defendent claims as a purchaser in execution, of movable property and not immovable property. Mr. Amudhachari raises the question that, if the superstructure is deemed to be movable property, there is no provision under the Presidency Small Cause Courts Act or under the Rules of the Presidency Court of Small Causes to secure possession of the same. I do not see any difficulty in the matter. It is not in dispute that suits for possession of movable property are cognizable by the Presidency Small Cause Courts. The decision of this Court in *Sadayammal* v. *Angammal*[1], though not directly in point, clearly enunciates the scope and ambit of the deeming provision under section 28. In that case, a decree-holder in a small cause suit sought to attach the superstructure which the defendant, a tenant, would be entitled to remove without the permission of the landlord before the termination of the tenancy. A third party preferred a claim to it which was allowed. A suit was filed in the City Civil Court to set aside the order on the claim petition. A Division Bench of this Court held that the superstructure must be deemed to be movable property falling within section 28 of the Presidency Small Causes Court Act, and that the City Civil Court has no jurisdiction to try the suit, as the question arose in execution of the Small Cause Court decree. It was pointed out that there in no distinction between questions arising 'in' execution and questions arising 'out of' execution of a Small Cause Court decree. In the light of the decision, to accept the argument of learned Counsel for the defendant would be to lead to anamolous results. On the decision, under a decree of Small Cause Court the superstructure will be moveable property and all the questions arising in respect of them will be dealt with as relating to movable property. If a claim is allowed in execution of the Small Cause Court decree, the party against whom the adverse order is passed has necessarily to file a claim suit in the Court of Small Causes. Now, what is contended for the appellant is that, for the purpose of filing a suit for possession of property by the auction-purchaser, the superstructure should be treated as immovable property. The right to possession clearly arises out of vesting of the property in execution proceedings. Section 28 of the Act enacts that, for the purpose of the execution of a decree of the Small Cause Court and for the purpose of deciding all questions arising in the execution of the decree, anything attached to the immovable property shall be deemed to be movable property and this Court in the aforesaid case held that there is no distinction between questions arising 'in' execution and questions arising 'out of' execution of a Small Cause Court decree. If the property is movable property, either Article 181 or Article 49 may be applicable. But, whatever Article it may be, the period within which action should be taken to secure possession is three years. When the Legislature provides that something shall be deemed to be other than what it is, having deemed it so, one cannot stop half way, when it comes to the inevitable corrolaries of that state of the things. The deeming shall be continued to the realisation of the purpose for which it is to be so deemed. Clearly vesting of the property in the purchaser is not the be all and end all of the execution proceedings. He has purchased the superstructure in execution of he Small Cause Court decree and it is deemed to be movable property, because before the termination of his tenancy the tenant may lawfully remove the superstructure without the permission of his landlord.

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1. (1939) 1 M.L.J. 776.

Section 28 provides that the property sold in execution may be severed by the purchaser, but that it shall not be removed from the immovable property until he has done to the property whatever the judgment-debtor would have been bound to do to it if he had removed such thing. The section contemplates not only attachment and sale but also severance of the property by the purchaser. The deeming provision or fiction continues till the thing is severed and possession is secured by the purchaser. It follows that the superstructure sold under section 28 of the Act is movable property and the auction purchaser has title to the superstructure not as immoveble property but as movable property. As the plaintiffs were not parties to the suit O.S. No. 1994 of 1954, it is unnecessary to say anything about the validity of the proceedings therein.

As possession of the property has not taken place within three years of the sale certificate Exhibit B-11, dated 14th November, 1942, the claim got barred by limitation. As the plaintiffs were not bound by the decree in O.S. No. 1994 of 1954 their objection in execution was valid, for long before that the title of the purchaser had became extinguished. When the purchaser 1st defendant had lost his title, the 2nd defendant who purchased the property from the 1st defendant got no title to it. The plaintiffs have been in possession of the property for years prior to their offering obstruction. Quite properly the lower appellate Court has held that the obstruction offered by the plaintiffs was justified and the order of the executing Court directing the removal of the obstruction was liable to be set aside.

In the result, the second appeal fails and is dismissed with costs. No leave.

V.M.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

V. Balakrishnan .. *Appellant**

v.

RM.A.N. Annamalai Chettiar and others .. *Respondents.*

Madras Agriculturists Relief Act (IV of 1938), section 9—Interpretation—Merger of State of Pudukottai with the Province of Madras and Act made applicable to the State of Pudukottai from 1st January, 1950—" Upto the commencement of this Act", meaning of —Pudukottai agriculturists, if entitled to relief upto 1st January, 1950.

The Madras Agriculturists Relief Act of 1938 was intended to provide relief to indebted agriculturists in the then Province of Madras. The State of Pudukottai was not in the Province of Madras when the Act was ushered in. On 1st January, 1950, however, after the merger of the Indian States, this Act was made applicable to the State of Pudukottai. The words "upto the commencement of this Act" in section 9 (1) of the Act should mean upto 22nd March, 1938 and not 1st January 1950, otherwise the agriculturists in the Madras State can under similar circumstances get relief in interest only upto 22nd March, 1938, whereas agriculturists in the State of Pudukottai would be entitled to relief at the concessional rate of five per cent upto and inclusive of 1st January, 1950. A construction of statutory words which avoids differences of interpretation of technical character such as are calculated to produce inequalities between the agriculturists in Madras Province and agriculturists in the State of Pudukottai, should be avoided.

Appeal against the order of the Court of the Subordinate Judge, Pudukottai dated 31st March, 1966 and made in O.P.No. 3 of 1965.

N. Srivatsamani, for Appellant.

K. Gopalachari and *G. Krishnan*, for 1st Respondent.

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*A.A. O. No. 244 of 1966. 12th September, 1969.

The Court made the following

ORDER.—The petitioner, who is admittedly a debtor having been unsuccessful in his contention in the Court below that he was entitled to a greater relief under section 9 of the Madras Agriculturists Relief Act, 1938, is the appellant before me. The petitioner executed a mortgage on 2nd June, 1935, along with respondents 2 and 3 and obtained a sum of Rs. 10,000 from the first respondent. The hypotheca was situate in the State of Pudukottai, as it then was, at the time when the mortgage was executed. It is common ground that the Madras Agriculturists Relief Act, 1938, herein referred to as the Act, was ushered into and made applicable in the State of Pudukottai on and from 1st January, 1950. After the Act was so introduced and made applicable, the petitioner filed an application on 20th November, 1964, under section 19 (A-1) of the Act praying that the Court may declare as to what exactly was the amount due by the petitioner and others to the first respondent. The Court below, after having been appraised that there were other alienees in so far as this hypotheca was concerned, called upon the second respondent to disclose the names of such alienees. On the failure of the second respondent to do so, the Court below found that the petition as such under section 19 (A-1) was not maintainable for the procedure laid down in the Code of Civil Procedure having been made applicable to such enquiries, and the petitioner not having followed up such a prescribed procedure as envisaged in Order 34, the application was not maintainable. The Court also found as a fact that the calculation memo given by the first respondent was correct and had to be preferred to that filed into the Court by the petitioner. The Court was of the view that the date of introduction of the Act into Pudukkottai State is not the criterion for the awarding of interest. Whatever may be the reason on which the lower Court rendered its judgment, it accepted the calculation memo on the basis that the lower rate of interest has to be calculated only upto 22nd March, 1938, when the Act came into force in the Madras State. It is as against this the present appeal has been filed.

Mr. Srivatsa Mani, the learned Counsel for the appellant, urges that to interpret section 9 of the Act, and in particular the parenthesis *upto the commencement of this Act*, inspiration could be gathered from the similar language employed by the Legislature in section 19 of the Act, which also adopts the expression before the commencement of this Act. Apparently, the argument rests on the ground that the expression " before the commencement of this Act " appearing in section 19 (1) of the Act, has been interpreted by this Court as well as by the Supreme Court as to mean before the commencement of the Act, as extended to the State of Pudukkottai. Mr. Gopalachari, learned Counsel for the respondents, however, would urge that though the language is similar in sections 9 and 19, yet the purpose for which the benefits in these sections intended are distinct and different, and therefore, normally the rule of harmonious construction ought not to be literally applied in the instant case, and that the two expressions appearing in both the sections are to be interpreted in the context in which they appear.

The Madras Agriculturists Relief Act of 1938 was intended to provide relief to indebted agriculturists in the then province of Madras. The State of Pudukkottai was not in the province of Madras when the Act was ushered in, and therefore, there was no question of agriculturists in Pudukkottai State taking advantage of this Act on the date when it commenced. On 1st January, 1950, however, after the merger of the Indian States, this Act was made applicable to the State of Pudukkottai with the result the petitioner and others who claimed to be agriculturists were entitled, no doubt to take advantage of certain provisions of this beneficial enactment in so far as their debt was concerned. But it ought to be scrutinised as to what was the nature of benefit, its quality and content, by reason of the application of the Act to the State of Pudukkottai on 1st January, 1950.

No doubt, while interpreting section 19 (1) of the Act, this Court in *Alagappa Chettiar* v. *Nachiappa Chettiar*[1], and the Supreme Court in *Mohamed Abdul Khader* v. *Chidambaram Mudaliar*[2], expressed the view that by reason of the Madras Merged States (Laws) Act (XXXV of 1949), the Act in question was effectively introduced on 1st January, 1950, in the State of Pudukkottai. In the Madras case cited above, the Learned Chief Justice Rajamannar said as follows:

> "The words 'before the commencement of this Act' must obviously be construed *in this case* as 'before 1st January, 1950'. (the underlining is mine*) If, on the other hand, the words are taken literally and to mean the commencement of the Madras Act in 1938, then there would be the anomaly that section 13 would be applicable without the petitioner ever having had the opportunity of invoking the benefit of that section............"

He also further observed that:

> "Section 7 of the Merged States Act supports this view and in that it provides that any Court or other authority may construe such enactment with such alterations not affecting the substance as may be necessary or proper to adopt it to the matter before the Court or other authority."

To a similar effect is a decision of this Court in *Sebastia Pillai* v. *Kadher Meera Rowther*[3].

Having this background and basing his contention on the ratio of the cases referred to by me, Mr. Srivatsa Mani contends that a similar and like meaning has to be imputed to the similar language used by the Legislature in section 9 of the Act. Section 9 of the Act reads as under. I am extracting that portion of the section which is necessary for the purpose of this case.

> "Debts incurred on or after the 1st October, 1932, shall be scaled down in the manner mentioned hereunder namely:—
>
> (1) Interest shall be calculated up to the commencement of this Act at the rate applicable to the debt under the law......decree of Court under which it arises or at five per cent per annum simple interest whichever is less........"

It is stated that the Act, in so far as the State of Pudukkottai is concerned, having commenced on 1st January, 1950, then it is proper and indeed necessary that the expression "commencement of this Act" appearing in section 9 (1) of the Act should be understood also literally in the same way. As Chief Justice Rajamannar has pointed out that even under the Merged States Act, it is expressly provided that such a construction which would facilitate the application of the Act in any of the merged States and which would not affect the substance and content of the relief to be granted to the personnel contemplated by the Legislature can be adopted by Courts. If as contended by the learned Counsel for the appellant, the words "commencement of this Act" is to be literally understood as the date on which the Act was ushered into the State of Pudukkottai, then it would mean that the appellant would be entitled to relief at the concessional rate of five per cent upto and inclusive of 1st January, 1950. This could not have been the intention of the Legislature for the reason that the agriculturists in the Madras State can under similar circumstances get relief in interest only up to 22nd March, 1938, where as agriculturists in the State of Pudukkottai to which part the Act been extended would be placed in a more jealous position and gain an undue advantage over Madras agriculturists. This principle has been slightly hinted in a passage in "Maxwell on The Interpretation of Statutes" Eleventh edition, page 33. The learned author says:

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1. (1953) 2 M.L.J. 298 : I.L.R. (1953) Mad. 996.
2. A.I.R. 1969 N.S.C. 23 (P. 10)
3. (1962) 2 M.L.J. 530 : I.L.R. (1963) Mad. 108.

* Printed in italics.

"In construing a statute which applies to England and Scotland alike, it is desirable to adopt a construction of statutory words which avoids differences of interpretation of a technical character such as are calculated to produce inequalities between the citizens of the two countries."

The resultant inequality, if the argument of the learned Counsel for the appellant is accepted, is apparent and explicit. I am not inclined to apply section 9 of the Act in such a way so as to cause such inequality and create such a discrimination. No doubt, the principle of harmonious construction which is the salutary principle in the matter of interpretation of statutes should always prevail but even that, has an exception if it is found by Courts that such an interpretation and rigid understanding might lead to inequality. This is one such a case. I am therefore inclined to agree with the contention of the learned Counsel for the respondent that the words "upto the commencement of this Act" in section 9 (1) of the Act shoud mean upto 22nd March, 1938 and not 1st January, 1950 on which date the Act was made applicable to the State of Pudukkottai. The lower Court, no doubt, came to the correct conclusion and the order, therefore, need not be disturbed. The appeal is therefore, dismissed. There will be no order as to costs.

V.M.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M.M. ISMAIL.

The M. L. J. Press Private Ltd., Mylapore, Madras-4 .. *Petitioner**

v.

The Additional Commissioner for Workmen's Compensation, Madras-4, and another .. *Respondents.*

Payment of Wages Act (IV of 1936), *sections* 15 (2), 2 (vi) (a) *and* 7 (2) (f)—*Jurisdiction under section* 15 (2)—*When can be invoked—Agreement between employer and employees that a certain sum per month should be paid to the latter as advance—Sums so paid if 'wages' within section* 2 (vi) (a)—*Deduction of such advance by employer from wages payable to employees—Allegation that deduction is contrary to the terms of the agreement —Jurisdiction under section* 15 (2), *if attracted.*

The jurisdiction of the authority appointed under the Payment of Wages Act to entertain an application under section 15 (2) and to grant the direction contemplated by section 15 (3) is dependent upon the allegation of the employed person and the finding of the authority itself that any deduction has been made from the wages of the employed person contrary to the provisions of the Payment of Wages Act. Therefore, so long as the deduction that has been made is not contrary to the provisions of this Act, even though it may be contrary to any agreement entered into between the parties, still the jurisdiction of the authority under section 15 (2) of the Act cannot be invoked. It should not be forgotton that the authority appointed under the Payment of Wages Act is a special authority for the purpose of that Act and is not a general Court of the land having jurisdiction to decide all disputes of a civil nature arising between the parties.

For the purpose of bringing a payment within the scope of the term "wages" as defined in section 2 (*vi*) (*a*), it is necessary to establish that what was paid was remuneration and the concept of remuneration necessarily involves that the payment is wages for the work done or the service rendered. But if it is not wages paid for work done or service rendered, but it was intended to be an advance

* W.P. No. 2230 of 1969. 25th March, 1970.

recoverable or an *ad hoc* payment adjustable, that cannot com
of section 2 (*vi*) (*a*).

Thus, where an employer and its employees enter into an
certain sum per month should be paid to the employees purel
certain period, the sum so advanced would not be "wages" wi
of section 2 (*vi*) (*a*) and the employer is entitled to recover the sa
7 (2) (*f*) of the Payment of Wages Act and if the employer act
advance from the wages payable, there cannot be a case for th
diction under section 15 (2), even if the allegation be that the d
made contrary to the terms of the agreement entered into betw

Petition under Article 226 of the Constitution of India, pr
circumstances stated therein and in the affidavit filed therewith
will be pleased to issue a writ of *certiorari* calling for the records i
1968 on the file of the Additional Workmen's Compensation, Ma
the order, dated 16th June, 1969 and made therein.

M. R. Narayanaswami, for Petitioner.

T. Satya Dev, Assistant Government Pleader, for 1st Responde

S. Ramaswami, for 2nd Respondent.

The Court made the following

ORDER.—The second respondent herein was an employee of t
he was superannuated with effect from 31st May, 1968. Betwe
and its workmen an agreement under section 18 (1) of the Indust
and rule 98 of the Industrial Disputes Rules was effected on 9
The preamble to this agreement states that the workers of the p
management had entered into an agreement regarding their earli
a Memorandum of Settlement, dated 23rd April, 1962, which wa
end of 1965, but even during the currency of the agreement the wo
Union had been making demands for increased dearness allow
grades for certain workmen, or *ad hoc* payments and though the s
contrary to the terms of the agreement and the workers were no
or entitled to press any such claim, the management had been gi
cessions now and then to maintain industrial peace and good re
agreement further points out that the Union thereafter made a f
some *ad hoc* payment to the workers as they were in need of some i
that the Union desired that a sum of Rs. 10 per month be paid to a
workers as advance commencing from 1st April, 1965 till the end of
that the Union agreed to treat this as a purely temporary advance
and not related to any claim, benefit, wages or allowance to whi
might become entitled and that the said amount was to be recov
1966 in seven equal instalments out of the wages of workers pay
period. The further recital in the said agreement is that the manage
the request and it was finally agreed between both parties to the s
a sum of Rs. 7-50 per month to all the permanent workers in the
advance subject to the following conditions: (1) Each of the perm
of the petitioner would be paid a sum of Rs. 7-50 per month wit
June, 1965 till the end of 31st December, 1965. (2) The above pa
only as an advance which was recoverable from the workers as s
relation whatsoever to any benefit or allowance to which the worke
be entitled then or at any future date. (3) The aforesaid pay
recovered from the wages of the workers from the month of Februar
in March, 1966) in equal instalments for a period of seven months fr
i.e., from the wages due till the end of August, 1966. If during the a
the service of any employee should cease either due to resi

retirement, dismissal or otherwise, the management would be entitled to recover the amount already paid to him from the amount that might be payable to him by the management.

Subsequently, a dispute arose between the management and the workers as to the applicability of the recommendations of the Central Wage Board for non-journalist employees, the management contending that its establishment was not a newspaper establishment and therefore the recommendations of the Central Wage Board would not apply and the workers contending to the contrary. In view of this, a settlement, dated 7th March, 1966 was entered into between the parties under section 12 (3) of the Industrial Disputes Act, 1947. After setting out the above controversy, the settlement recorded :

> "Without prejudice to these contentions it is hereby agreed that the management will continue to pay the workmen Rs. 7-50 per month from January, 1966 onwards on the same terms as those contained in the settlement, dated 3rd August, 1965 between the parties until an authoritative decision is reached in regard to the applicability or otherwise of the Wage Board recommendations to this establishment."

One thing that can be immediately noticed is that while the settlement, dated 3rd August, 1965 provided for the payment of this monthly advance of Rs. 7-50 only for the specified period from 1st June, 1965 till the end of 31st December, 1965, the second agreement did not provide for any specific period during which the advance of Rs. 7-50 per month was payable. However, it stated that the payment would commence from 1st January, 1966, thereby making the payment of advance as a continuation of the payments made under the agreement, dated 3rd August, 1965. Yet another agreement was entered into on 10th May, 1968 under section 12 (3) of the Industrial Disputes Act. This agreement refers to the workers going on a strike on and from 23rd April, 1968, and conciliation being taken up by the Special Deputy Commissioner of Labour and there being no settlement reached between the parties. However, it refers to the fact that as a result of further conciliatory talks held by the said Special Deputy Commissioner of Labour at the request of the parties, a settlement was reached in the following terms :

> "(*i*) The workers' contention is that the recommendations of the Central Wage Board for Non-Journalists Employees are applicable to this establishment. The management's contention is that the establishment is not a newspaper establishment and that Wage Board Recommendations do not apply to it. Without prejudice to the contention of either parties an *ad hoc* payment of Rs. 12-50 per mensem in addition to Rs. 7-50 already paid as per the settlements, dated 3rd August, 1965 and 7th March, 1966 will be paid to the permanent workmen but no deductions of the *ad hoc* payment will be made on settlements of employees accounts or from wages till the decision of the Industrial Tribunal is made known.
>
> (*ii*) This payment will not form part of wages.
>
> (*iii*) The payment will be made effective from 1st January, 1968 ; the dues for April, 1968 will be paid on 13th May, 1968, the balance of dues from January to March, 1968 before 21st May, 1968.
>
> (*iv*) In regard to the issue in dispute referred to in clause (*i*) as well as the question as to how the *ad hoc* payment now made should be dealt with, parties will await Government orders on the conciliation report.
>
> (*v*) An advance of 8 days wages to daily rated and temporary workers of the Press will be paid and deducted in easy instalments against their wages."

There are a few other conditions but it is not necessary to refer to them.

When the second respondent herein was superannuated with effect from 31st May, 1968, the petitioner herein while settling his accounts deducted from the

amount payable to him a sum of Rs. 232-50. That sum represented the payment of monthly advances from 1st June, 1965 to 31st December, 1967. Once this deduction was made, the second respondent herein filed an application before the first respondent herein purporting to be under section 15 (2) of the Payment of Wages Act, 1936. The case of the second respondent was that the said amount was not to be recovered from the amounts payable to him in view of the settlement, dated 10th May, 1968 according to which the *ad hoc* payments could not be deducted on settlements of employees accounts, or from wages, till the decision of the Industrial Tribunal was made known. In reply to this case of the second respondent, the petitioner contended before the first respondent that the application itself was not competent as the amount deducted was not wages. The second contention put forward by the petitioner before the first respondent was that the agreement, dated 10th May, 1968 providing for the non-recovery of the *ad hoc* payment till the decision of the Industrial Tribunal was made known was confined only to the *ad hoc* payment of Rs. 12-50 payable under that agreement, but had nothing to do with the advance of Rs. 7-50 payable under the two earlier agreements and therefore the petitioner was justified in deducting the said sum of Rs. 232-50 from the amounts payable to the second respondent herein, since they represented the monthly advances of Rs. 7-50 paid to the second respondent under the first two agreements and not the *ad hoc* payment of Rs. 12-50 paid under the third agreement, dated 10th May, 1968. The first respondent overruled both these contentions of the petitioner and by an order, dated 16th June, 1969, directed the petitioner to pay a sum of Rs. 232-50 together with a sum of Rs. 25 as compensation to the second respondent herein. It is to quash this order of the first respondent the present writ petition under Article 226 of the Constitution of India has been filed.

In the affidavit filed in support of the writ petition, though a point has been taken that the application preferred by the second respondent to the first respondent was not competent, the grounds on which this objection was taken are not expressly set forth. However, during the course of the hearing, with reference to the facts of the case, a question arose, on the language of section 15 (2) of the Payment of Wages Act, 1936 and on the basis of the very claim put forward by the second respondent to the first respondent, whether that application was competent. Since the question went to the root of the jurisdiction of the first respondent, I allowed the learned Counsel for the petitioner to raise this question, and at the request of the learned Counsel for the second respondent, I gave him time to meet this point. It is only thereafter the point was presented before me and the jurisdiction of the first respondent to pass the order in question was challenged.

For the purpose of understanding this argument it is necessary to refer to certain provisions contained in the Payment of Wages Act, Central Act IV of 1936. Section 7 of the Act deals with the deductions that can be made from the wages payable to an employee. Sub-section (1) of that section states :

> " Notwithstanding the provisions of sub-section (2) of section 47 of the Indian Railways Act, 1890 (IX of 1890) the wages of an employed person shall be paid to him without deduction of any kind except those authorised by or under this Act."

Sub-section (2) of that section enumerates the kinds of decuctions that may be made from the wages of an employed person and clause (*f*) of that sub-section states :

> " Deductions for recovery of advances of whatever nature (including advances for travelling allowance or conveyance allowance), and the interest due in respect thereof, or for adjustment of overpayments of wages".

Section 15 (2) of this Act states :

> " Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person, or any payment of wages has been delayed, such person himself, or any legal practitioner or any official of a registered Trade

Union authorised in writing to act on his behalf, or any Inspector under this Act, or any other person acting with the permission of the authority appointed under sub-section (1) may apply to such authority for a direction under sub-section (3)."

There are two provisos to this sub-section, which it is not necessary to refer for the purpose of this case.

Thus it will be seen that the jurisdiction of the authority appointed under the Payment of Wages Act to entertain an application under section 15 (2) of that Act and to grant the direction contemplated by section 15 (3) of that Act is dependent upon the allegation of the employed person and the finding of the authority itself that any deduction has been made from the wages of the employed person contrary to the provisions of this Act. Therefore, so long as the deduction that has been made is not contrary to the provisions of this Act, even though it may be contrary to any agreement entered into between the parties, still, the jurisdiction of the authority under section 15 (2) of the Payment of Wages Act cannot be invoked. It should not be forgotten that the authority appointed under the Payment of Wages Act is a special authority for the purpose of that Act and is not a general Court of the land having jurisdiction to decide all disputes of a civil nature arising between the parties. In view of the limited and restricted jurisdiction of the authority appointed under the Act, for the purpose of enabling him to exercise the jurisdiction under section 15 (2), the condition precedent for the invocation thereof, namely, that a deduction has been made contrary to the provisions of that Act should be established. As I already pointed out, the two agreements entered into on 3rd August, 1965 and 7th March, 1966 expressly refer to the payment of Rs. 7-50 as being only an advance and having nothing to do with the claim or any allowance payable to the employed person. Consequently, under section 7 (2) (*f*) of the Payment of Wages Act, 1936, the petitioner is entitled to recover the advance and if the petitioner actually recovers the advance, there cannot be a case for the exercise of jurisdiction on the part of the first respondent under section 15 (2) of that Act, because there has been no deduction contrary to the provisions of that Act. In this context it is necessary to refer to the very application preferred by the second respondent before the first respondent. The second respondent in his application filed before the first respondent did not put forward a case that any deduction contrary to the provisions of the Payment of Wages Act had been made by the petitioner herein. But the only contention that was put forward was that the petitioner was not entitled to make the deduction as per the memorandum of settlement entered into between the parties. Hence the second respondent invoked the jurisdiction of the first respondent under section 15 (2) of the Payment of Wages Act, not on the allegation that the petitioner made any deduction contrary to the provisions of the Payment of Wages Act, but on the allegation that it made a deduction contrary to the memorandum of settlement entered into between the parties. Even the first respondent in the order impugned in this writ petition does not record any finding that the petitioner made any deduction contrary to the provisions of the Payment of Wages Act, which finding alone will give jurisdiction to the first respondent to give the direction contemplated by section 15 (3) of that Act. All that the first respondent points out in his order is that in the third settlement dated 10th May, 1968 it is not clearly stated whether the sum of Rs. 7-50 per month being paid according to the first two settlements forms part of the *ad hoc* payment or whether the amount could be recovered on the settlement of accounts of a worker and that as the petitioner has not recovered the advance paid for the period 1st June, 1965 to 31st December, 1965 in seven equal instalments as provided in the first settlement, the petitioner is not authorised to recover the payment of Rs. 7-50 per mensem for the period 1st June, 1965 to 31st December, 1967. Consequently, it is clear that with reference to the language of section 15 (2) of the Payment of Wages Act, 1936, the first respondent was not entitled to entertain the application

preferred by the second respondent and pass the impugned order. This conclusion of mine derives support from the following observations of the Supreme Court in its judgment in *Payment of Wages Inspector, Ujjain v. Surajmal Mehta, Director, Barnagar Electric Supply and Industrial Company Ltd. and another*[1] :

"It is explicit from the terms of section 15 (2) that the authority appointed under sub-section (1) has jurisdiction to entertain applications only in two classes of cases, namely, of deductions and fines not authorised under sections 7 to 13 and of delay in payment of wages beyond the wage periods fixed under section 4 and the time of payment laid down in section 5. This is clear from the opening words of sub-section (2) of section 15, namely, 'where contrary to the provisions of this Act' any deduction has been made or any payment of wages has been delayed. These being the governing words in the sub-section, the only applications which the authority can entertain are those where deductions unauthorised under the Act are made from wages or there has been delay in payment beyond the wage period and the time of payment of wages fixed or prescribed under sections 4 and 5 of the Act."

Mr. S. Ramaswami, the learned Counsel for the second respondent attempted to escape from this conclusion by putting forward the contention that the amount of Rs. 7-50 paid to the second respondent herein and recovered by the petitioner herein itself constituted wages and did not constitute advances as contemplated by section 7 (2) (*f*) of the Payment of Wages Act. I am unable to accept this argument and as a matter of fact this contention fails at the face of the agreements entered into between the parties. Mr. Ramaswami invited my attention to the definition of the term "wages" as contained in clause (*vi*) of section 2 of the Payment of Wages Act, with particular reference to sub-clause (*a*). The definition of the terms wages is as follows :

"Wages means all remuneration (whether by way of salary, allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes—

(*a*) any remuneration payable under any award or settlement between the parties or order of a Court."

According to Mr. Ramaswami, the sum of Rs. 7-50 paid to the second respondent herein comes within the scope of sub-clause (*a*) of clause (*vi*) of section 2, being the remuneration payable under any award or settlement, between the parties. I am unable to accept this argument. The agreement dated 3rd August, 1965 clearly and categorically stated that the sum of Rs. 7-50 to be paid by the petitioner to the workmen was only an advance and was recoverable from the wages of the workmen and it had nothing whatever to do with any benefit or allowance to which the workmen were entitled or would become entitled. The second agreement dated 7th March, 1966 stated that the management would continue to pay the workmen Rs. 7-50 per mensem from January, 1966 onwards on the same terms as those contained in the settlement dated 3rd August, 1965 between the parties, thus making it clear that the second settlement dated 7th March, 1966 also maintained the character of the payment only as an advance and did not either expressly or by implication change or alter the character of that payment from being an advance to anything else. The learned Counsel relied on the third settlement dated 10th May, 1968 and contended that under that agreement not only an *ad hoc* payment of Rs. 12-50 per mensem was payable but also the payment of Rs. 7-50 per month, with the result an *ad hoc* payment of Rs. 20 became payable under the third settlement

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1. (1969) 2 S.C.J. 108 : (1969) 1 L.L.J. 762.

dated 10th May, 1968. In view of the fact that an industrial dispute is stated to be pending in regard to the same, I do not propose to express any final opinion on this part of the argument of the learned Counsel for the second respondent, nor is it necessary for the purpose of deciding this writ petition. However, with regard to the limited contention put forward by the learned Counsel for the second respondent that the sum of Rs. 7-50 comes within the scope of sub-clause (*a*) of clause (*vi*) of section 2 of the Payment of Wages Act, I am of opinion that this contention is utterly untenable. I have already referred to the fact that the first two agreements maintained the character of the payment of Rs. 7-50 per month only as advance and in my opinion, the third agreement dated 10th May, 1968, did not in any way change this character. As a matter of fact, one of the conditions contained in the third agreement, which I have already extracted, clearly and categorically mentioned that this payment would not form part of wages. In the light of this clear and categorical term contained in the agreement, I am unable to accept the argument of Mr. Ramaswami that the sum of Rs. 7-50 paid by the petitioner to the second respondent would fall within the scope of sub-clause (*a*) of clause (*vi*) of section 2 of the Payment of Wages Act. As a matter of fact for the purpose of applying sub-clause (*a*) of clause (vi) of section 2 of the Payment of Wages Act, it is necessary to establish that what was paid was remuneration and the concept of remuneration necessarily involves that the payment is wages for the work done or the service rendered. But if it is not wages paid for work done or the service rendered, but it was intended to be an advance recoverable or an *ad hoc* payment adjustable, that cannot come within the scope of sub-clause (*a*) of clause (vi) of section 2 of the Payment of Wages Act. In view of this and particularly in view of the express provision contained in the third agreement itself that the payment would not form part of wages, I am unable to agree with Mr. Ramaswami that the amount of Rs. 7-50 paid by the petitioner to the second respondent formed part of the wages as defined in clause (*vi*) of section 2 of the Payment of Wages Act and therefore the deduction of that amount in the settlement of accounts of the second respondent would bring the case within the scope of section 15 (2) of the Payment of Wages Act. Under these circumstances, I am of the opinion that the application preferred by the second respondent to the first respondent under section 15 (2) of the Payment of Wages Act, was incompetent. With reference to the allegation of the second respondent as well as on the finding of the first respondent, the first respondent had no jurisdiction to issue the impugned direction in exercise of his powers under section 15 (3) of the Payment of Wages Act, 1936.

Under these circumstances, the writ petition is allowed and the impugned order of the first respondent is quashed. There will be no order as to costs.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE P. R. GOKULAKRISHNAN.

Messrs. Hindustan Leaver Limited, Edamalaipattipudur, Tiruchirapalli .. *Appellant**

v.

The Presiding Officer, Labour Court, Madurai and another .. *Respondents.*

Industrial dispute-Charges against workman—Domestic enquiry—Enquiry officer himself cross—examining defence witnesses and putting leading questions—Enquiry if becomes vitiated.

In a domestic enquiry, it should not be lost sight of that the enquiry officer is often not instructed in the law and has no training in the method of conducting

*W. A. No. 77 of 1969. 10th March, 1970.

an enquiry. It is possible that when he is not assisted by an of tion or by Counsel prosecuting, he may put questions which may of a cross-examination. Some of the questions in cross-examinat to be leading ones even. These features by themselves do n issue whether the principles of natural justice has been violated. is not merely a question of form but one of substance. The go be whether the examination, cross-examination or putting of le by the enquiry officer are such as would indicate that he is not is biassed in the sense he not merely acted as an enquiry officer b his limits as such and played the role of a prosecutor. The conclusi or partiality cannot be jumped at merely on finding that the enq self-questioned the witnesses or cross-examined them. It will d facts of each case.

Appeal under Clause 15 of the Letters Patent against the order of Mr. Justice Kailasam, dated 16th October, 1968 and made in the Special Original Jurisdiction of the High Court in Writ Petition N presented under Article 226 of the Constitution of India to issue a calling for the records in I. D. No. 2 of 1967 on the file of the Labour C and quash its preliminary award, dated 18th April, 1967 and publi ment to part II, section I of the *Fort St. George Gazette*, dated 24th M

M. R. Narayanaswami, for Appellant.

B. R. Dolia, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, C.J.—The appeal is directed against an order of Ka declined to interfere with an award of the Presiding Officer I Madurai.

Two workmen of the appellant, after a domestic enquiry on a against them, were dismissed from service, and the dispute relating the dismissed workmen and the management was the subject-matter to the Presiding Officer. He mentioned three grounds for characteris tic enquiry as biassed and, therefore, vitiated by non-observance of of natural justice. The first ground was that before framing the c planation of the delinquent workmen ought to have been asked for. rightly considered that this was not a proper ground. The third not of any substance. It was that during the examination of the refer witness for the prosecution was interposed. We have examined t find that there was no prejudice and there was no violation of the natural justice either.

The second ground was based on the fact that the Enquiry Officer c some of the defence witnesses and particularly one Hamid, and e leading questions. The Labour Court dealing with this matter stat

"The enquiry officer himself questioned the witness and what strange to note is that he went beyond his scope to cross-examine of the workmen. This is evident from the cross-examination of Sri P. K. Hamid, Sri Pasupathi, Sri Yusuf and Murugan. It is Enquiry Officer himself assumed the role of a cross-examiner whi missible. Therefore, the enquiry has to be characterised as biass be said to be either independent or fair. The entire enquiry pr vitiated by non-observance of the principles of natural justice."

Kailasam, J., considered that the Enquiry Officer would ap exceeded his limits by cross-examining and putting some leading que assumed the role of a prosecutor.

We are unable to sustain the second ground of the Labour Court. In a domestic enquiry, it should not be lost sight of that the Enquiry Officer is often not instructed in the law and has no training in the method of conducting an enquiry. It is possible that when he is not assisted by an officer in prosecution or by Counsel prosecuting, he may put questions which may be in the nature of a cross-examination. Some of the questions in cross-examination may appear to be leading ones even. These features by themselves do not conclude the issue whether the principles of natural justice have been violated. Natural justice is not merely a question of form but one of substance. The governing test, in our opinion, will be whether the examination, cross-examination or putting of leading questions by the Enquiry Officer are such as would indicate that he is not fair or that he is biassed, in the sense he not merely acted as an Enquiry Officer but went beyond his limits as such and played the role of a prosecutor. Having broadly indicated the principles, its application will depend on the facts of each case.

For instance, in *Firestone Tyre and Rubber Company* v. *Their Workmen*[1] the witnesses were subjected to cross-examination by the Enquiry Officer and some of the questions appeared to be leading. The contention that this showed that the Enquiry Officer had assumed the role of a prosecutor did not find favour. Hidayatullah (as he then was) who spoke for the Court observed :

"No doubt, some of the questions appear to be leading, but they were respecting the matter of record and too much legalism cannot be expected from a domestic enquiry of this character."

It was held that the principles of natural justice were not violated. A similar point was dealt with by the Supreme Court in *Workmen B. & C. Mills* v. *B. & C. Mills*[2]. Repelling the criticism that the Enquiry Officer had acted both as a prosecutor and a Judge, it was observed :

"No doubt, there was no officer separately conducting the prosecution on the side of the Management, but what the Labour Officer had done, as evidenced by Exhibit M-9 was to put questions to the witnesses and elicit answers and allow the worker to cross-examine those witnesses. Similarly, he has also taken the statements of the worker and asked for clarification from him wherever necessary. Therefore the enquiry proceedings, as held by the Labour Court, have been completely, fair and impartial."

The question in each case will, therefore, be whether having regard to the questions put and the cross-examination made by the Enquiry Officer, it can reasonably be concluded that he was unfair or partial in conduncting the enquiry. The conclusion of unfairness or partiality cannot be jumped at merely on finding that the Enquiry Officer himself questioned the witnesses or cross-examined them. The Labour Court had, therefore, misconceived the position and proceeded on the basis that because the Enquiry Officer had questioned the witnesses and also cross-examined, the enquiry was biassed and could not be treated as independent or fair. That view of the Labour Court cannot be said to be correct.

Mr. Dolia, for the second respondent, laid a good deal of stress on the fact that the Enquiry Officer stated that in respect of the statement made by P. K. Hamid that no enquiry was held by the Foreman, Mr. Thatham he wished to bring in Mr. Thatham to give evidence. Certain instances of cross-examination made by the Enquiry Officer have been particularly pointed out by Counsel. But having given our best attention to the matter, we are not persuaded that the Enquiry Officer conducted himself unfairly or was partial. There was no violation of the principles of natural justice in this respect.

The order of the Labour Court is quashed and the appeal is allowed, but with no costs.

V.K. — *Appeal allowed.*

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1. (1968) 2 S.C.J. 83 : (1968) 2 An.W.R. (S.C.) 29 : (1968) 2 M.L.J. (S.C.) 29 : (1968) 1 S.C.R. 307 : (1967) 2 L.L.J. 715.
2. (1970) 1 L.L.J. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM AND MR. JUSTICE K. N. MUDALIYAR.

M. G. Chakravarthi Naicker and another .. *Appellants**

v.

K. M. Thillaimoorthy and others .. *Respondents.*

Board's Standing Orders (Madras)—Board's Standing Orders 15, *rule* 3 (5)—*Scope—Nature of orders under—Assignment of land—When could be cancelled.*

Constitution of India (1950), *Article* 226—*Orders of administrative bodies—When could be subject to judicial review.*

It is well recognised that orders regarding assignment of lands are disposed of in a quasi-judicial manner and even the rules contained in the Board's Standing Orders envisage disposal of applications for assignment in such manner. Board's Standing Orders 15 (18) envisages a hierarchy of original, appellate and revisional authorities prescribing even periods of limitation for appeals and revisions. The right of the appellate or revisional authorities to interfere with the orders of the subordinate officers are restricted to cases of material irregularity in the procedure, gross injustice, mistake of fact, fraud or misrepresentation and so on.

Thus it is patently clear that even the powers of the Government to interfere with orders of the subordinate officers ordering assignment of land in favour of a person, is not unlimited but is constricted to the vitiating circumstances, if any, referred in the Standing Orders. The power of the Government under sub-rule 3 (5) of Board's Standing Orders 15 to interfere with orders of assignments is co-extensive with the power contained in sub-rule 18. To justify or warrant interference of Government under rule 3 (5) the power of the Government in exercising its discretion cannot outreach or extend beyond the limitations found in rule 18 of Board's Standing Orders 15.

Lakshmi Ammal v. *Board of Revenue, Madras*, (1965) 2 M.L.J. 95: I.L.R. (1965) 1 Mad. 526 : (1964) 77 L.W. 293, referred and followed.

Per *Sadasivam, J.*—The question whether orders regarding assignment of land could be challenged by invoking the writ jurisdiction of the High Court will depend on the rights of the petitioner and the violation of the principles of natural justice by the appropriate authority in dealing with such rights. Though the rules in Board's Standing Orders may be only administrative instructions, the actual orders passed by the concerned officials, Board of Revenue and Government will give rise to legal rights and the disregard or violation of the rules will be relevant in dealing with those rights in writ jurisdiction.

Where Government has made an order of assignment of certain land in favour of a person and it is established that the person in whose favour the order has been made (and after his death his legal representative) has made repeated efforts to get the formalities of assignment completed, but has failed in his attempts due to the delay on the part of the authorities, such a person has acquired some rights which cannot be adversely affected by orders of the Government except on grounds contemplated in rule 18 of Board's Standing Orders 15. The mere fact that the formalities were not completed by issuing an order in Form D cannot mean that the assignment can be revoked by the Government at any time at its discretion.

Appeals respectively under clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Venkatadri dated 7th October, 1966 and made in

* W.A. Nos. 289 of 1966 and 236 of 1967.

17th September, 1969.

the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1156 of 1963 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records in G.O.Ms. No. 2817, Revenue Department, dated 19th September, 1963 on the file of the first respondent therein, communicated in the proceedings R.C. No. 39546/63-B-6 dated 1st October, 1963 of the District Revenue Officer, Chingleput District; and quash the order of the first respondent dated 19th September, 1963 and made in G.O. No. 2817, Revenue Department.

The Government Pleader, for Appellants.

V. Vedantachari and *P. Bhaskaran*, for Respondents.

The Court delivered the following Judgments

K.N. Mudaliyar, J.—One M.G. Chakravarthi Naicker and the State of Madras are the appellants in these two writ appeals respectively. They seek to appeal against the order of Venkatadri, J., in Writ Petition No. 1156 of 1969 quashing the order issued by the Government of Madras, Revenue Department, in G.O. Ms. No. 2817, dated 19th September, 1963.

The two writ appeals may be dealt with by us in a common order.

Succinctly stated, the facts are that one Manicka Naicker, the father of the first respondent, K. M. Thillaimoorthy, applied in the year 1952 to the Government for the assignment of the poramboke land in S. No. 531/1 of the extent of 2 acres 90 cents. Manicka Naicker alleged in his petition that Chakravarthi Naicker, a political thyagi, was already given lands in Vaiyyavoor village comprised in S. No. 531/4, S. No. 531/5, and S.No. 531/6. It is seen from the records that Chakravarthi Naicker got lands assigned in his favour the total extent being 7 acres. Manicka Naicker also complained against the attempted trespass on the land in S.No. 531/1 of the extent of 2 acres 90 cents, which was said to be in his possession.

In G.O.Ms. No. 109, Revenue, dated 10th January, 1953 the Government accepted the recommendations of the Board of Revenue and directed that the land in S. No. 531/1 of Vaiyyavoor Village, Kancheepuram taluk, measuring 2 acres 90 cents might be assigned in favour of Manicka Naicker. Further, the Collector of Chingleput was requested to take steps to evict the political sufferer, Chakravarthi Naicker, from the above land and to put Manicka Naicker in occupation with immediate effect. No doubt the assignment was subject to the usual condition and any other conditions, which the Collector of Chingleput might deem necessary to impose. It emerges from the records that even as late as 15th June, 1957 Manicka Naicker made a grievance of the trespass committed by Chakravarthi Naicker and he prayed for an order to issue the patta in his name. On 16th July, 1967, Manicka Naicker again prayed for patta to be granted in his favour in pursuance of G.O.Ms. No. 109, Revenue, dated 10th January, 1953. He further made a complaint about the non-receipt of orders from the Collector of Chingleput. The Collector of Chingleput in his proceedings dated 9th May, 1958 addressed to the Secretary to the Government, Revenue Department, reported about the Tahsildar taking steps to evict the encroacher. He further reported about his sanctioning the transfer proposals in respect of the land in question. He reported also about his asking the Sub-Collector, Chingleput, to investigate the cause of inordinate delay in submitting the transfer proposals and to take disciplinary action against the persons responsible. Thillaimoorthi, the first respondent herein, states in his affidavit in the writ petition that the learned District Magistrate (Judicial), Chingleput, declared in M.C. No. 138/61 on 30th December, 1961 that the first respondent's party are in possession of the disputed property and that they are entitled to the possession thereof until evicted therefrom in course of law. Chakravarthi Naicker filed Crl.R.C.

No. 143 of 1962 on the file of this Court against the order in M.C. No. 138/61, and Kailasam, J., by his order dated 6th September, 1963 dismissed his petition.

Chakravarthi Naicker filed a petition before the Government on 11th January, 1961 on the ground that he was in possession of the land. He further relied on a passage from the judgment of the Sub-Magistrate, Kancheepuram, in C.C. No. 2525 of 1951 to show that he was in possession of the land during the relevant period, *viz.*, 14th August, 1951. He further alleged in that petition about some material irregularity in the procedure. He further claimed that he was cultivating the land with paddy from 1949. On 14th September, 1961 Manicka Naicker died. On 24th March, 1962, K. M. Thillaimoorthi, son of Manicka Naicker, filed an application before the Deputy Secretary to Government, Revenue Department, for the assignment of the land in question. In this application he complained about the non-co-operation of the local officials.

The District Revenue Officer, Saidapet, in his proceedings dated 20th November, 1962, addressed to the Secretary to Government, Revenue Department, states as follows:

"With reference to Government Memorandum No. 4550-F-1/61-2, dated 31st March, 1962, I submit that it cannot be said that the late Sri Manicka Naicker took no interest in getting possession of the land. It would not be proper to deny the legal heirs of Sri Manicka Naicker from being given the land ordered to be assigned in G.O.Ms. No. 109, Revenue, dated 10th January, 1953.

It cannot be out of place to state here that the encroacher who is in possession of the land assigned to the late Sri Manicka Naicker appears to have been successfully preventing the steps taken to evict him."

Ultimately, the Government passed G.O.Ms. No. 2817, dated 19th September, 1963 directing that the land in question should be assigned to M. G. Chakravarthi Naicker. The Government further cancelled the order in G.O. Ms. No. 109, Revenue, dated 10th January, 1953. In this order it is significant to note that after noticing the Government order directing the assignment of the land in question to Manicka Naicker after evicting the encroacher, the Government observed:

"Sri Chakravarthi Naicker filed several petitions against the orders of the Government and requested assignment of the land in his favour. The requests were however rejected."

This we find in the body of the said Government Order. The above facts culled out from the records placed before the Court are necessary to meet the argument of the learned Government Pleader, which will be noticed presently. Aggrieved by this order of the Government K. M. Thillaimoorthi along with his mother and brother filed Writ Petition No. 1156 of 1963, which was allowed by Venkatadri, J. It is against the order of Venkatadri, J., that the two writ appeals, Writ Appeal No. 289 of 1966 by M.G. Chakravarthi Naicker, and Writ Appeal No. 236 of 1967 by the State of Madras, have been filed.

The learned Government Pleader, Mr. S. Mohan, invites our attention to paragraphs 3 (5), 12 and 18, of Board's Standing Orders No. 15 and also to Form D and contends before us that Board's Standing Orders 15 (18) is not applicable at all, and that inasmuch as the final order, which has got to be embodied in Form D, has not been issued to Manicka Naicker or his son, the first respondent, the Government have the power and right to assign the land in favour of Chakravarthi Naicker. We are not in a position to accept this argument. When we bear in mind the contents of the earlier G.O. Ms. No. 109, Revenue, dated 10th January, 1953 directing assignment of the land in favour of Manicka Naicker, the assignment remains to be completed formally, subject to usual conditions and any other conditions. It was open to the Collector,

or the other revenue authorities subordinate to him to have made use of Form D and completed the formalities of assignment. It would emerge very clearly from the statement of facts noticed earlier that the first respondent and his father made every effort to get the formal assignment completed, but both of them were thwarted from time to time by certain forces at work. In fact Manicka Naicker and his son, the first respondent, made a grievance of their failure to the revenue authorities. As a matter of fact even the Collector of Chingleput makes mention about his contemplated disciplinary action against the persons responsible. It is obvious that there were no laches on the part of either Manicka Naicker or his son, the first respondent, in pursuing the matter to get the completion of the assignment subject to certain usual conditions or special conditions. We conclude from the facts seen from the records produced by the learned Government Pleader before the Court and the averments in the affidavits filed by the parties that there has been laches only on the part of the Revenue Department in pursuing the matter and completing the assignment in favour of Manicka Naicker.

Board's Standing Orders 15 (18) envisages a hierarchy of original, appellate and revisional authorities, prescribing even periods of limitation for appeals and revision petitions. It is important to notice that the Collector interferes with the decisions of the subordinate officers only in cases (1) where there has been a material irregularity in the procedure, or (2) where the decision was grossly inequitable, or (3) where the decision exceeded the powers of the officer who passed it, or (4) where the decision was passed under a mistake of fact or (5) owing to fraud or misrepresentation. The relevant extract of Board's Standing Orders 15 (18) is set down below :

> "The Board of Revenue or the Government may set aside, cancel or in any way modify the decision of any authority subordinate to them, within three years, if they are satisfied that the decision was grossly inequitable; they may exercise similar powers without any limit of time, where there has been a material irregularity in the procedure or where the decision exceeded the powers of the officer, who passed it or it was passed under a mistake of fact or owing to fraud or misrepresentation."

It is patently clear that even the powers of the Government are not unlimited. On the contrary they are constricted to the vitiating factors found in the extract to justify the interference on the part of the Government. The powers of the Government are severely delimited. The Government cannot traverse beyond this field. The learned Government Pleader relied on paragraph 3 (5) of Board's Standing Orders 15 and argued logically that in matters of disposing of land the Government are not barred from using their discretion and the discretion of the Government is unbounded and untrammelled and even arbitrary. We are inclined to think that rule 18 may not be applicable in cases of original orders passed by Government. Assuming the content of power is located in rule 3 (5) of the Board's Standing Orders 15, that power is only co-extensive with the power contained in rule 18. It is exhaustive but not illustrative. To justify or warrant the interference of Government under rule 3 (5) the power of the Government in exercising "discretion" cannot outreach or extend beyond the limitations found in rule 18 of the Board's Standing Orders 15.

We cannot countenance the construction put by the learned Government Pleader on paragraph 3 (5) of Board's Standing Orders 15 to show that the discretion of the Government is absolute and unfettered. We are in respectful agreement with the observations of Srinivasan, J., in *Lakshmi Ammal* v. *Board of Revenue, Madras*[1], which is as follows:

It is well recognised that orders regarding the assignment of lands are disposed of in a quasi-judicial manner and even the rules contained in the Board's Standing Orders directed the disposal of applications for assignment in such manner. The rules also provide for a hierarchy of appeal and revisional tribunals indicating very

1. (1965) 2 M.L.J. 95 : I.L.R. (1965) 1 Mad. 526 ; (1964) 77 L.W. 293 at 295.

clearly that the right agitated is in fact dealt with on at least quasi-judicial basis. In this particular case, it is beyond dispute that the petitioners have been in permissive occupation of the land for nearly 20 years. As landless poor persons, they are entitled to certain privileges and an application for assignment is covered by the Government Orders and the Board's proceedings themselves. By virtue of the earlier G.O.Ms. No. 109, Revenue, dated 10th January, 1953 Manicka Naicker did derive some rights in the land assigned in his favour, and before his rights or the rights of his son, the first respondent are invaded the first respondent was entitled to place certain matters before the Government before an adverse order in the later G.O.Ms. No. 2817, Revenue, dated 19th September, 1963 is passed against him. We find no reasons given in the impugned Government Order. The mere petition filed by the first respondent on 24th March, 1962, is not to be equated with an opportunity given to the first respondent to represent his case. We also do not find in the impugned Government Order any reference to any of the vitiating factors found in paragraph 18 of Board's Standing Orders No. 15 to justify the cancellation of the earlier G.O.Ms. No. 109, dated 10th January, 1953. We do not consider that the discretion vested in the Government under paragraph 5 of the Board's Standing Orders 15 is absolute and untrammelled. S.A. de Smith in his Judicial Review of Administrative Action observed at page 277:

"As was observed in a leading modern Canadian case, 'there is always a perspective within which a State is intended to operate.'—

(*iii*) Where the competent authority is empowered to take such action or to impose such conditions as it thinks fit in relation to a subject-matter.

The Courts have generally declined to construe such words as investing the authority with an absolute discretion to do as it pleases."

"The Minister of Transport, when empowered to make such order as he thought fit on a licensing appeal, was obliged to confine himself to matters raised in the course of the appeal and to disregard irrelevant considerations in exercising his discretion."

At page 324 the learned author also observes:

"*Certiorari* will issue to quash an order made by an adminisrative body only if the functions of that body are characterised as being at least partly judicial. It will issue not only for error in the exercise of judicial functions, but also for error in the non-judicial element of a composite function, provided that the error causes the body exercising those functions to exceed its powers."

Garner in his book on Administrative Law at page 115 observes as follows:

"We now come to the major ground on which the Court in this country will review the decision of an administrative agency, namely, because the agency has exceeded its statutory powers. Every administrative agency, whether it is a Government department, a local authority, an independent statutory corporation or an administrative tribunal, owes its powers exclusively to Parliament (with the sole exception of an agency operating under and by virtue of the royal prerogative) and it will be acting *ultra vires* in so far as it may purport to step outside or exceed those powers; any such purported exercise of power will therefore be void. As we have said, any ground on which judicial review may be justified can logically be classified as a branch of the *ultra vires* doctrine; here we shall deal with straightforward cases where *ultra vires* was expressly urged as the solitary or principal justification for judicial review. Thus in *The King* v. *Minister of Transport* Ex parte *Upminster Services, Ltd.*[1], it was held that the Minister had no power to revoke contingently a road service licence granted by the Traffic Commissioners under the Road Traffic Act, 1930, although a person who had been refused a licence by the Commissioners was given a statutory right to appeal to the Minister."

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1. (1934) 1 K.B. 277.

In our considered opinion sub-paragraph 5 of Board's Standing Order 15 is not helpful to the Government. The Government cannot step outside or exceed the powers vested in them as enumerated in the relevant extract of paragraph 18, of Board's Standing Order 15. In our view the discretion vested in the Government under paragraph 5 is serverely delimited by the strict limitations enumerated in paragraph 18, which fetter, trammel and control the discretion of the Government in the matter of disposing of lands.

We are only concerned here to examine whether the impugned order was made after observing the required procedure in paragraph 18 of Board's Standing Order 15 and whether the Government have taken into consideration all the relevant material that they should. There has been a failure to furnish an adequate opportunity to the first respondent to meet the contentions of Chakravarthi Naicker against the assignment of the land in favour of Manicka Naicker according to the earlier Government Order.

Sri V. Vedantachari appearing for Chakravarthi Naicker supported the contentions of the learned Government Pleader.

We affirm the order of Venkatadri, J. passed in Writ Petition No. 1156 of 1963 quashing G.O. No. 2817 Revenue, dated 19th September, 1963 and dismiss both the writ appeals and in the circumstances there will be no order as to costs.

It is open to the Government to interfere with the earlier Government Order in case they find sufficient material and grounds as described in paragraph 18 of the Board's Standing Order 15.

Sadasivam, J.—I have had the advantage of perusing the judgment of my learned brother and I agree with him that the order of Venkatadri, J., passed in W.P. No. No.1156 of 1963 against which the writ appeal has been preferred could be affirmed. However, I like to express my opinion on the contention of Sri S. Mohan appearing for the Government that the rules in Board's Standing Order 15 are merely administrative in character and that under sub-paragraph (5) of paragraph 3 of Board's Standing Order 15, "nothing contained in any of these rules shall be held to debar Government from disposing of land otherwise than under these rules at their discretion as heretofore", and that this Court has no jurisdiction to interfere with the order of assignment made by the Government. He relied on the decision of Veeraswami, J., as he then was, in Writ Petition No. 747 of 1959, on the file of this Court, that the rules in the Board Standing Orders relating to the assignment are no more than administrative instructions and that they have not been framed in the exercise of any statutory power to make rules. But the Writ Appeal No. 203 of 1962 filed against the order on W.P. No. 747 of 1959 was disposed of on the ground that the disappointed applicant for the assignment of the land cannot be said to have any legal grievance to justify his invoking the discretionary powers of this Court under Article 226 of the Constitution. Mr. S. Mohan also relied on the decision in W.P.No. 867 of 1963, on the file of this Court. The petitioner in that case applied for assignment of 2 cents of Government poromboke land in S.No. 310/1 Konnur village adjacent to his land in S.No. 309 on the ground that by reason of the State Government acquiring two cents of his land out of the extent of six cents in S.No. 309 of Konnur Village, he was not able to construct his building as planned. The Government assigned two cents of land in S.No. 310/1, Konnur Village, to him at the market value. But the second respondent in that petition, who had already encroached on the land, applied to the Tahsildar for permission to retain possession of the land by passing an order of assignment in his favour. In view of the fact that the second respondent had constructed a building, the Government passed the revised impugned order under which they allotted one cent to each party, namely, the petitioner and the second respondent. It was urged by the learned Government Pleader in that writ petition that as an assignment becomes complete only after the signing of the prescribed Form D in Appendix V of Board's Standing Order Volume I, the Government had jurisdiction to vary the order and in dealing with this contention Venkatadri, J., observed that there was much force in it. But he has pointed out in the earlier

part of that order that by virtue of the powers under Board's Standing Order 15, paragraph 18, the Government have jurisdiction to vary the prior order within three years if they are satisfied that the earlier decision was grossly inequitable and that they may exercise similar powers without any limit of time where there has been a material irregularity in the procedure or where the decision exceeded the powers of the Officer who passed it, or where it was passed under a mistake of fact or owing to fraud or misrepresentation. Thus the second order passed by the Government in that case could be justified under the provisions of Board's Standing Order 15, paragraph 18.

Thus the question whether orders regarding assignment of land could be challenged by invoking the writ jurisdiction of this Court will depend on the rights of the petitioner and the violation of the principles of natural justice by the appropriate authority in dealing with such rights. Though the Rules in Board's Standing Orders may be only administrative instructions, the actual orders passed by the oncerned revenue officials, Board of Revenue and Government will give rise to legal rights and the disregard or violation of the rules will be relevant in dealing with those rights in writ jurisdiction.

Though Board's Standing Order 15, paragraph 3 (3) enumerates the class of persons who are eligible for assignment of lands by the issue of D. Form patta, no person can have a legal grievance if a person belonging to one class is preferred to a person belonging to another class. But once the Tahsildar communicates his order in Form D in Appendix V of Board's Standing Order, Volume 1, as required in Board's Standing Order 15, paragraph 18, certain legal rights accrue in favour of the grantee. As pointed out by Srinivasan, J., in *Lakshmi Ammal* v. *Board of Revenue, Madras*[1], referred to by my learned brother, the order of the Tahsildar is a quasi-judicial one subject to cancellation or modification in appeal or revision as provided in the Board's Standing Order. Unlike in the case of Board's Standing Order 15, paragraph 12, which requires a communication by the Tahsildar to the parties concerned in Form D in Appendix V of Board's Standing Order apart from sending an order to the village authorities, there is no such requirement when the Government directly passes orders as contemplated in Board's Standing Order 15, paragraph 3 (5). The Government has made an order of assignment in favour of Manicka Naicker, the father of the first respondent Thillaimoorthy and directed the Collector of Chingleput to give effect to the order by evicting Chakravarthi Naicker from the land. By virtue of the said order, Manicka Naicker has acquired some rights in the land and the principles of natural justice require that his rights should not be affected adversely without his being heard and except on legal grounds such as those contemplated in Board's Standing Order 15, paragraph 18. In the subsequent order of the Government in favour of Chakravarthi Naicker, there is absolutely no discussion as to the merits of his claim to get the assignment of the land in his favour in spite of the prior order in favour of Manicka Naicker. It is no doubt open to the Government to interfere with their earlier order in favour of Manicka Naicker, if Chakravarthi Naicker is able to bring his case within the provisions of Board's Standing Order 15 paragraph 18, which embody only principles of natural justice usually applied in quasi-judicial proceedings.

I agree with my learned brother that in the above circumstances, the writ appeals should be dismissed but without costs.

R.M. *Appeals dismissed.*

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1. (1965) 2 M.L.J. 95: I.L.R. (1965) 1 Mad. 526: (1964) 77 L.W. 293 at 295.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE S. MAHARAJAN.

Ramiah Chettiar .. *Petitioner**

v.

K. Sankaralingam Pillai .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (2) (i)—*Petition for eviction on the ground of wilful default—Compromise stipulating that landlord would be entitled to possession if tenant committed default in payment of rents in future—Order passed in terms of compromise—Legality—Objection to jurisdiction if may be raised in execution proceedings.*

It is well-settled that where the tenancy is governed by the Madras Buildings (Lease and Rent Control) Act, 1960, it is not open to the landlord or the tenant to contract themselves out of the obligations under the Act or to agree to resort to a procedure not contemplated by the Act. It is not, therefore, open to the parties to enter into a contract, which would have the effect of bypassing the provisions of the Act. The legal position would be the same even though such a contract is embodied in a compromise which has received the *imprimatur* of a Tribunal contemplated by the special enactment.

In a petition under section 10 (2) (*i*) of Madras Act (XVIII of 1960), for eviction on the ground of wilful default in payment of rent, the Rent Controller has jurisdiction to direct eviction only if he found, as a fact, that the tenant had committed wilful default in the payment of rent for the period preceding the date of the application. There is nothing in the Act which empowers the prescribed Tribunal to order eviction if default be committed in future.

Where, therefore, in a petition for eviction on the ground that the tenant had committed wilful default in payment of rent the parties entered into a compromise whereby the tenant undertook to pay the future rents regularly and agreed that if he failed to do so the landlord would be entitled to take possession of the demised premises without further notice and the Rent Controller ordered the petition in terms of the compromise ;

Held, the order was without jurisdiction and the tenant could raise this objection in execution proceedings.

(The Court also rejected the contention that by virtue of the compromise the tenant ceased to be a tenant and became a bare licencee.)

Petition under section 115 of Act (V of 1908) praying the High Court to revise the order of the District Court, Madurai in C.R.P. No. 16 of 1968—E.P. No. 57 of 1968 in R.C.O.P. No. 21 of 1963, District Munsif Court of Thirumangalam.

N. Krishnamurthi, for Petitioner.

A. Ramanathan and *K.S. Ahamed*, for Respondent.

The Court made the following

ORDER.—This petition is filed by the tenant to revise the order of the learned District Judge of Madurai, dismissing the revision petition filed by him under section 25 of the Madras Buildings (Lease and Rent Control) Act, 1960, (hereinafter referred to as the Act), against the order passed by the District Munsif, Tirumangalam in E.P. No. 57 of 1968 in R.C.O.P. No. 21 of 1963. The dispute between the parties arose under the following circumstances. The respondent-landlord filed an application for eviction against the tenant-petitioner under section 10 (2) (*i*) of the Act on 8th August, 1963 before the Rent Controller. The ground alleged in the petition was that the tenant had committed wilful default in the payment of rent for the period 14th January, 1963 upto 16th July. On 19th October, 1963, the

* C.R.P. No. 1651 of 1968. 26th September, 1969

tenant, who had been served with notice, appeared in Court and made an endorsement to the following effect :

> "The respondent hereby agrees that in future he will pay the petitioner regularly the monthly rent due for every Tamil month on or before the 10th of the succeeding Tamil month. I hereby agree that in case I fail to pay in future the rent due for a month on or before the 10th of the succeeding month, the petitioner shall in these very proceedings and without notice to me, take possession of the petition schedule premises. Judgment may be rendered in accordance with these terms."

This endorsement was signed by the tenant on 19th October, 1963. Below his signature the landlord's advocate made the following endorsement;

> " Eviction order may be passed on the above terms ".

On the same date the Rent Controller passed the following order :

> " Joint endorsement made. Petition is ordered in terms of the joint endorsement."

It is important to note that nothing is stated in the endorsement about the claim made by the landlord for arrears of rent due by the tenant for the period from 14th January, 1963 upto 16th July, 1963. As the endorsement dated 19th October, 1963 contemplates only a default in the payment of future rent, it must be assumed that all arrears of rent due by the tenant upto 19th October, 1963 had been paid to the landlord. There is no admission in the endorsement that the tenant has committed any default, much less wilful default. Nor is there anything in the order of the Court to show that any ground justifying the eviction of the tenant had been established or admitted. Subsequent to the date of the order passed in terms of the joint endorsement the tenant continued to be in possession of the premises and was paying the monthly rent regularly for a period of more than four years. However, on 6th January, 1968, the landlord filed an execution petition praying for eviction of the tenant on the ground that he had committed wilful default in payment of rent, for October, November, 1967. The tenant contested the application on the ground that the order passed by the Rent Controller on foot of the joint endorsement was not executable and that if any default had been committed by him in the payment of rent for a period long subsequent to the date of the joint endorsement, the landlord was liable to file another petition for eviction under section 10 (2) (*i*) of the Act and could not validly execute the order dated 19th October, 1963 thereby circumventing the provisions of the special enactment. This contention was rejected by the learned District Munsif on the execution side and revision filed against this order before the learned District Judge, Madurai, met with the same fate.

It is well-settled that where the tenancy is governed by the Madras Buildings (Lease and Rent Control) Act, 1960, it is not open to the landlord or the tenant to contract themselves out of the obligations under the Act, or to agree to resort to a procedure not contemplated by the Act. A scrutiny of the entire scheme of the Aot shows that notwithstanding contracts to the contrary, the Legislature intended to regulate the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Madras. It is not, therefore, open to the parties to enter into a contract, which would have the effect of by-passing the provisions of the Act. The legal position would be the same even though such a contract is embodied in a compromise which has received the *imprimatur* of a Tribunal contemplated by the special enactment. The essential pre-condition to the eviction of a tenant under the Act is that the one or the other of the grounds mentioned in section 10 or sections 14 to 16 of the Act should have been established. In this case the Rent Controller had the jurisdiction to direct eviction, only if he found, as a fact, that the tenant had committed wilful default in the payment of rent for the period preceding the date of the application. Under section 11 of the Act, if the tenant defaults to pay rent accruing due in respect of the building until the termination of the proceedings before the Controller or the appellate authority, the Controller or the appellate authority, as the case may be, would have the power to make

an order directing the tenant to put the landlord in possession of the building, regardless of the fact whether the original ground alleged in the petition had been established or not. It is important to note that there is nothing in the Act which empowers the prescribed Tribunal to order eviction if default be committed *in future*. What has happened in this case is that the tenant, after continuing in possession of the premises for over four years after the termination of the proceedings before the Rent Controller and paying rent regularly every month, was alleged to have committed default in the payment of rent for October-November, 1967. The Rent Controller, who is a creature of the statute and whose jurisdiction is circumscribed and limited by the provisions thereof, has no power to direct eviction on the basis of an anticipatory default. What the parties have done, in effect, is to enter into a contract, whereby they renounced the rights and obligations under the Act and prescribed, resort to a process of direct execution in violation of the provisions of the Act, without its being preceded by an enquiry under section 10 (2) of the Act. As has been held by Ramamurti, J., in *Isherdas Shani and brothers* v. *Rajeswara Rao*[1], these Acts are remedial measures conceived for the protection and welfare of tenants, and the object of the legislation will be frustrated, if tenants are permitted to enter into contracts giving up the protection afforded to them by the Act.

Learned Counsel for the landlord relies upon the ruling of the Supreme Court in *Ramamurthi Subudhi* v. *Gopinath Naick*[2]. That was a case where two persons litigating before the ordinary civil Court, entered into a compromise under Order 23, rule 3 Civil Procedure Code in the Court of the Subordinate Judge, Berhampur, who granted a decree in terms of the compromise. The decree-holder filed an application for execution of the decree and the judgment-debtor objected to the execution. The point that arose for consideration before their Lordships of the Supreme Court was whether the compromise decree created a lease or licence. Upon the terms of the compromise it was held that only a licence had been created and not a lease and consequently the Orissa House Rent Control Act did not apply to the relationship between the parties to that compromise and that execution could proceed. On the contrary, the joint endorsement made on the petition filed by the landlod in this case shows that the relationship of landlord and tenant continued unimpaired by the compromise and the tenant agreed to pay the future monthly rent regularly on or before the 10th of the succeeding month. It is clear from the terms of the compromise that the petitioner-tenant continued to be in possession of the premises in his capacity as tenant and that his juridical status was not in any manner transformed by virtue of the compromise into that of a licencee. Section 2 sub-clause (8) of the Act defines a 'tenant' in very broad terms, to include any person by whom or on whose account rent is payable for a building and even to include the surviving spouse, or any son, or daughter and any person continuing in possession after the termination of the tenancy in his favour. The petitioner would clearly be a 'tenant' within the meaning of this definition. I therefore repel the contention of the learned Counsel for the respondent that, by virtue of the compromise, the petitioner ceased to be a tenant and became a mere licencee and therefore, escaped the mischief of the Act.

It is next contended that the objection of the tenant could not be properly raised in execution. I am unable to agree. If the order sought to be executed had been passed by an authority which had no jurisdiction to do so, it was certainly open to the judgment-debtor to raise in execution proceedings any objection regarding the competency of the order or the jurisdiction of the Tribunal that had passed it. I am therefore of the view that the compromise entered into between the parties in R.C.O. P. No. 21 of 1963, embodied what in fact was a contract by-passing the provisions of the Act, which is intended to save the tenants even from their own contracts.

If, in this case, the joint endorsement had admitted that the tenant had committed defult in the payment of rent and was therefore liable to eviction, and if further an eviction order had been passed by the Rent Controller with a condition that it would

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1. (1968) 2 M.L.J. 233. A.I.R. 1968 S.C. 919.
2. (1968) 2 S.C.J. 528 : (1968) 2 S.C.R. 559.

remain suspended so long as the tenant continued to pay the rent regularly in future, and would come into force the moment he committed default it would perfectly be an enforceable order. But, unfortunately, that is not the case here. I, therefore, set aside the order of the Courts below and allow this revision petition. In the circumstances, I make no order as to costs.

V.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P.R. GOKULAKRISHNAN.

S. Rangaraju .. *Appellant**

v.

Sulochana Ammal .. *Respondent.*

Registration Act (*XVI of* 1908), *section* 35 (3) (c) *Proviso,* 73, 75 *and* 77—*Scope* —*Sale deed—Execution of—Executants evading registration of the document—Registrar, if could direct the document to be registered by one of the executants leaving the others who denied execution.*

There is no question of the chara cter of the document changing simply because one of the executants of the document, alone being directed to execute the document. Taking the intention of the Legislature and the purport of the Indian Registrartion Act, it has been clearly brought out under section 35 (3) (*c*) Proviso, that the Registrar has power to direct a document to be registered by one of the executants leaving the others who denied them. Therefore, it is not correct to say that registering a document means registering of a document as a whole with all the executants and not with one of the executants of the document.

Appeal against the Decree of the Court of the Subordinate Judge (II Additional Madurai dated 12th August, 1964 in Appeal Suit No. 23 of 1964, preferred against the decree of the Court of the District Munsif of Madurai Taluk at Madurai in O.S. No. 158 of 1962.

K. Gopalachari and *G. Krishnan,* for Appellant.

N.K. Ramaswamy and *S. Sundaram Ayyar,* for Respondents.

The Court delivered the following

JUDGMENT :—The first defendant is the appellant in this second appeal. The plaintiff has filed the suit under section 77 of the Indian Registration Act for a decree directing the Registrar to register a document.

The case of the plaintiff is that the first defendant (appellant) and the other three defendants constitute a joint family, that the defendants 1 to 3 and the first defendant as guardian of the fourth defendant executed a sale deed on 15th June, 1961 for Rs. 4,000 in favour of the plaintiff in respect of the suit property, that the first defendant received Rs. 3,500 at the time of the execution and the balance was reserved to be paid at the time of the registration. The plaintiff was put in possession of the suit property. The first defendant has come with the scribe from Dindigul to Alanganallur for executing the sale deed and the plaintiff paid Rs. 320 to the first defendant for the purchase of the stamp papers. After the first defendant executed the sale deed he demanded the consideration and the plaintiff stated that the consideration would be paid only after the execution of the sale deed by defendants 2 and 3. Immediately the first defendant went with the sale deed to Dindigul and returned the same evening. He represented that the defendants 2 and 3 also have signed the sale deed. Then the consideration of Rs. 3,500 was paid to the first defendant (appellant). Thereafter the defendants evaded to register the document. The the plaintiff presented the document before the Sub-Registrar, Alanganallur for compulsory registration. But the Sub-Registrar passed an order on 13th September, 1961 refusing to register the document. The plaintiff then filed an appeal to the District Registrar under section 77 of the Indian Registrartion Act. The appeal

* S.A. No. 644 of 1965. 26th September, 1969.

was dismissed after an enquiry on 25th June, 1962 and therefore the plaintiff filed the present suit.

Defendants 1 to 3 filed a written statement and the guardian of the fourth defendant adopted the same. As far as the first defendant is concerned he has stated that he executed the document thinking that it was a lease deed. As far as the other defendants are concerned, they denied execution of the document.

The learned District Munsif accepted the case of the plaintiff so far as the first defendant is concerned and granted a decree directing the Registrar to register part of the sale so far as it related to the execution by the appellant herein and dismissed the suit as against defendants 2 and 3. On appeal, the learned Additional Subordinate Judge of Madurai confirmed the finding of the learned District Munsif. As regards the defendants 2 and 3 the finding is that the signatures have not been proved by the plaintiff. Only on that ground the trial Court has refused to direct registration of the document along with defendants 2 and 3. The plaintiff has not preferred any cross-objections against this denial of her right and the same is not the subject-matter before this Court.

The learned Advocate for the appellant states that under section 77 of the Indian Registration Act, the Court can only direct the entire document to be registered and there is no question of its registration as against any particular person. Then he contends that such a document can be registered as against a particular person only when he is the sole executant and when he admits the execution of it. The third point raised by the appellant is that there is a definite finding to the effect that the document is not probably genuine and hence the Court should not have granted registration. As regards the third contention, I do not find any finding by the Courts below as to the genuineness of the document. The learned District Munsif in paragraph 15 of his judgment states that it is for the plaintiff to positively show that the defendants 2 and 3 executed the document by putting the signatures thereto and this has not been proved by her. Hence this finding will not amount to conclude that the document is not genuine. As regards the second point raised by the learned Counsel for the appellant, I do not think there is any substance in the same in asmuch as the question of the first defendant executing the document has been decided factually by the Courts below and there is no point in the first defendant merely denying the execution of the document in spite of the decision of both the Courts below.

The learned Counsel for the appellant argues on the first point to the effect that the document intended to be registered under section 77 is the whole document and not part of it. By that he means that when a document has been signed by four persons, it is not correct under section 77 of the Indian Registration Act to direct registration of the document only by one of the persons. For this purpose he reads sections 35, 73, 75 and 77 of the Indian Registration Act. As far as section 35 is concerned, before the amendment of section 35 (3) (*c*), there is a decision in *Muhammad Ewaz* v. *Birj Lal*[1]. This decision has been brought to my notice by the learned Counsel for the respondent. There, the Privy Council holds :

> "The words of section 35 of the Indian Registration Act (VIII of 1871) which provide that "If all or any of the persons by whom the document (*i.e.*, the document presented for registration) purports to be executed deny its execution, or if any such person appears to be a minor, an idiot, or a lunatic, or if any person by whom the document purports to be executed is dead and his representative or assign denies its execution, the registering officer shall refuse to register the document", taken literally, seem to require the registering officer to refuse registration of a deed which purports to be executed by several persons if any one of them deny execution, or appear to be a minor, an idiot, or a lunatic.
>
> Since such a construction would cause great difficulty and injustice, and would be inconsistent with the language and tenor of the rest of the Act, the words in question must be read distributively, and construed to mean that the registering

1. (1875-77) I.L.R. 1 All. 465 : L.R. 4 I.A. 166 (P.C.).

officer shall refuse to register the document *quoad* the persons who deny the execution of the deed, and *quoad* such persons as appear to be under any of the disabilities mentioned."

Incorporating the observations of the Privy Council, section 35 is now amended and section 35 (3) (*c*) proviso says that the Registering Officer shall refuse to register the document as to the person so denying, appearing or dead. This clearly means that the registering authority can register a document in so far as it relates to that person whose execution has been proved in spite of the fact that there are other persons who have subscribed their signatures as executants to the document. Then we have section 73 which deals with the application to the Registrar where the Sub-Registrar refuses to register on the ground of denial of execution. Then section 75 deals with the order by Registrar to register and the procedure thereon. The learned Counsel for the appellant draws my attention to show that what is contemplated by these sections are registering the document. He strenuously argues that registering a document means the registering of a document as a whole with all the executants and not with one of the executants of the document. In this line of the argument, the learned Advocate for the appellant states that under section 77 the refusal by the Registrar to register the document is correct. I am not able to subscribe to this view. The document means the nature and the character of the document such as sale deed, mortgage deed and lease deed, etc. There is no question of the character of the document changing simply because the one of executants of the document, alone being directed to execute the document. Taking the intention of the Legislature and the purport of the whole act it has been clearly brought out under section 35 (3) (*c*) proviso, that the Registrar has power to direct a document to be registered by one of the executants leaving the others who denied execution. To the same effect is the decision reported in *Jetharam* v. *Hazarimal*[1].

In view of the discussions and the decisions referred above, I am of the view that the Courts below are correct in directing the Registrar to register the document under section 77 of the Registration Act with the first defendant alone as the executant.

In these circumstances, the second appeal fails and the same is dismissed with costs.

No leave.

V.M.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K.N. MUDALIYAR.

Pakkirisami and another .. *Petitioners**

Criminal Procedure Code (V of 1898), *sections* 155 (2), 190 (1) (b), 200 (aa) *and* 537—*Investigation of a case in contravention of the provision—If vitiates the trial—Defect—When cured.*

The bar of investigation of a non-cognizable offence under section 155 (2) of the Criminal Procedure Code, without an order of a Magistrate is no doubt intended to be obeyed and any deliberate disregard of the prohibition in the hope that the irregularities in the procedure will be cured under section 537 of the Code, has to be deprecated. But it is now well settled that a mere defect or illegality in investigation, will not by itself affect the competence or jurisdiction of the Court to try the offence. In appropriate cases the defect may be rectified by ordering re-investigation. Even otherwise section 190 (1) (*b*) and section 200 (*aa*) read together clearly enables a Court to take cognizance of any offence on the report in writing of any Police Officer. Hence unless the illegality in the investigation has caused any prejudice to the accused or has led to miscarriage of justice, the trial cannot be said to be vitiated. The cognizance of an invalid police report is not prohibited or rendered a nullity.

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1. A.I.R. 1958 Raj. 28.

*Crl. R. C. No. 1418 of 1967.
(Crl. R. P. No. 1399 of 1967.) 31st October, 1969.

Where cognizance of the case has in fact been taken by the Court and the trial has come to a termination, the invalidity of the investigation that preceded the filing of the report does not vitiate the result unless miscarriage of justice has been caused thereby.

Podan v. *State of Kerala*, (1962) 1 Crl.L.J. 339; *H.N. Rishbud* v. *State of Delhi*, (1955) 56 Crl.L.J. 526 : (1955) S.C.J. 283 ; *Public Prosecutor* v. *Ratnavelu Chetty*, (1926) I.L.R. 49 Mad. 525 : 52 M.L.J. 210, referred.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the Judgment of the Court of the District Magistrate (J) Thanjavur at Kumbakonam dated 26th May, 1967 and passed in C.A.No. 122 of 1967 (C.C.No. 195 of 1967 Court of the Sub-Magistrate (J) Nagapattinam).

V. Venkataraman, for Petitioners.

The Additional Public Prosecutor, for State.

The Court made the following

ORDER.—MR. Venkataraman appearing for the two petitioners (A-2 and A-3) who have been convicted for offences under sections 323 and 352, Indian Penal Code, assailed the convictions mainly on the ground that the investigation is vitiated by an illegality in that the requirements of section 155 (2), Criminal Procedure Code, have not been complied with.

P.W. 6 the Sub-Inspector who appears to have earlier filed charge-sheets for offences under sections 323 and 341, Indian Penal Code, after investigating the matter, referred the case. Thereafter, he seems to have filed petty case charge-sheets under section 75 of the Madras City Police Act. The trial Magistrate, finding the charge-sheets to be defective, returned them, and, by him memo. dated 26th January, 1967, the Sub-Inspector ultimately modified them as those under section 323, Indian Penal Code, read with section 190 (1) (*b*). It is on this chequered history of filing of the amended charge-sheets continuously that Mr. Venkataraman has grounded his main attack.

Section 155 (2), Criminal Procedure Code, reads as follows :—

"No Police Officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate".

The next relevant section would be section 190 (1) (*b*) which enables cognizance of offences by Magistrates upon a report in writing of such facts made by any Police Officer. The other relevant section for the matter now debated, is section 200 (*aa*), Criminal Procedure Code, which runs :

"When the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or a public servant acting or purporting to act in the discharge of his official duties."

Mr. Venkataraman argues that the report of the Police Officer under section 173, Criminal Procedure Code, must be within the compass of section 155 (2), Criminal Procedure Code, and only such report is contemplated within the meaning of section 190 (1) (*b*), Criminal Procedure Code. In my view, the prohibition of section 155 (2) in regard to the report made by a Police Officer under section 173 does not place the report beyond the ambit of section 190 (1) (*b*). It is true the Sub-Inspector (P.W. 6) has referred the case registered for offences under section 323 and 341, Indian Penal Code. But in its place he appears to have filed invalid charge-sheets for an offence under section 75 of the City Police Act and later motified them for an offence under section 323, Indian Penal Code, read with section 190 (1) (*b*). The apparent *hiatus* is not of any material importance, for the charge-sheets filed by the Sub-Inspector would fall squarely within section 200 (*aa*), Criminal Procedure Code. Mr. Venkataraman cited the ruling of this Court in Crl.M.P. No. 1791 of 1969 contending that the entire trial is vitiated by the defective investigation. I find no material to support such an argument from the judgment in Crl.M.P.No. 1791 of 1969.

Mr. Venkataraman cited the decision in *Podan* v. *State of Kerala*[1], to conted that section 155 (2) expressly prohibits the investigation by the police *suo motu* of non-cognizable offences, that the order of a Magistrate is a condition precedent for such investigation, and that the irregularity cannot be cured under section 537 as it results in failure of justice. I am in agreement with the observations of the learned Judge (Anna Chandy, J.) that a deliberate disregard of the prohibition under section 155 (2) has to be deprecated, that the provisions of Criminal Procedure Code are mean to be obeyed, and that the Police Officers are not allowed deliberately to contravene those provisions in the hope that the irregularities they commit will be cured under section 537, Criminal Procedure Code. In the peculiar circumstances of the case the learned Judge found that the irregularity has resulted in the failure of justice, since the signed statement taken from the accused was used in evidence against him. Such a feature is not present in the present case.

Mr. Venkatraman placed strong reliance on the statement of law found in para. 10 of the Supreme Court jugment in *H.N. Rishbud* v. *State of Delhi*[2], and it is as follows:

"It does not follow, however, that the invalidity of the investigation is to be completely ignored by the Court during trial. When the breach of such a mandatory provision is brought to the knowledge of the Court at a sufficiently early stage, the Court, while not declining cognizance, will have to take the necessary steps to get the illegality cured and the defect rectified, by ordering such re-investigation as the circumstances of an individual case may call for."

It is true that in the present case the Court did not order re-investigation. But the case is such a simple one that it did not require any further investigation. The following statement of law from the Full Bench decision of this Court in *Public Prosecutor* v. *Ratnavelu Chetty*[3], cited by the learned Public Prosecutor is of material importance :

"........For section 190 (1) (*b*) authorises certain Magistrates to take cognizance of *any offence* upon a *report in writing* of facts which constitute such offence *made by any Police Officer*, and section 200 (*aa*) provides that where a public servant acting or purporting to act in the discharge of his official duties makes a complaint of an offence, nothing shall require the Magistrate to examine him before taking cognizance of the offence."

In *Safdar Hussain* v. *S.K. Abdul Rahim*[4], Anantanarayanan, J., (as he then was) followed the Full Bench decision containing the aforesaid statement of law. The learned Judge holds that, even in non-cognizable cases, nothing will prevent the police from competently filing a report which should then be treated as a complaint under section 200(*aa*) Crimnal Procedure Code, with the sole variation that no sworn statement need be recorded from the Police Officer lodging the complaint. The learned Public Prosecutor argued that, although the investigation in this case may be vitiated by some infirmities, the later cognizance and trial of the accused is not in any way vitiated. In *Zutshi* v. *The King*[5], while dealing with a case under the Bombay City Police Act, their Lordships of the Privy Council observed :

"The argument was that the trial and conviction of the appellants were void because the police investigation which led up to the trial was conducted illegally. This was a non-cognizable case and section 58 (2) of the Bombay City Police Act 1902 provides that no Police Officer shall investigate a non-cognizable case without the order of a Presidency Magistrate. There was an order by the Chief Presidency Magistrate in this case but it was submitted that this order was invalid because the Magistrate was bound before making such an order to comply with the requirments of section 202 (1) of the Criminal Procedure Code and he had not done so".

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1. (1962) 1 Crl. L. J. 339.
2. (1955) S.C.J. 283 : (1955) 1 S.C.R 1150 : (1955) 1 M.L.J. (S.C) 173 : (1955) 1 An.W.R. (S.C.) 173: 56 Crl L.J. 526 at 534: A.I.R. 1954 S.C. 196 at 204.
3. (1926) I.L.R. 49 Mad. 525 at 538: 52 M.L.J. 210.
4. (1966) M.L.J. (Crl.) 281 : (1966) 1 M.L.J. 331 : (1967) Crl.L.J. 84 (1966) L.W. (Crl.) 43.
5. (1950) M.W.N. (Crl.) 41 (2) : L.R. 77 I.A. 62 : (1950) 1 M.L.J. 302 : A.I.R. 1950 P.C. 26.

This question of jurisdiction was not considered fully by the Privy council, as the question was not raised before the High Court or in the appellant's petition for Special Leave to appeal.

In *H.N. Rishbud* v. *State of Delhi*[1], the scope of sections 190, 193, 195 to 199 and 537, Criminal Procedure Code, has been considered by the Supreme Court. A defect or illegality in investigation, however serious, has no direct bearing on the competence or the procedure relating to cognizance or trial. No doubt a police report which results from an investigation is provided in section 190, Criminal Procedure Code, as the material on which cognizance is taken. But it cannot be maintained that a valid and legal police report is the foundation of the jurisdiction of the Court to take cognizance. Section 190, Criminal Procedure Code, is one out of a group of sections under the heading "conditions requisite for initiation of proceedings". The language of this section is in marked contrast with that of the other sections of the group under the same heading, that is, sections 193 and 195 to 199. These latter sections regulate the competence of the Court and bar its jurisdiction in certain cases excepting in compliance therewith. But section 190 does not. While no doubt, in one sense, clauses (*a*), (*b*) and (*c*) of section 190 (1) are conditions requisite for taking of cognizance, it is not possible to say that cognizance on an invalid police report is prohibited and is therefore a nullity. Such an invalid report may still fall either under clause (*a*) or (*b*) of section 190 (1) and in any case cognizance so taken is only in the nature of error in a proceeding antecedent to the trial. To such a situation section 537, Criminal Procedure Code, is attracted. If, therefore, cognizance is in fact taken, on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice. That an illlgality committed in the course of investigation does not affect the competence and the jurisdiction of the Court for trial, is well settled. Hence, where the cognizance of the case has in fact been taken and the case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby. Mr. Venkataraman has not shown in the present case any serious prejudice in respect of the trial and convictions of the petitioners.

On the merits it is argued that the complaint has not disclosed the name of A-3 (2nd petitioner). On this ground A-3 is entitled to an acquittal, or his participation in the crime is highly doubtful.

As regards A-2 (1st petitioner), Mr. Venkataraman pleaded that the first petitioner is a young student of 19 years. I consider that the antecedents of this young person are such that the ends of justice will be met by admonishing him under section 3 of the Probation of Offienders Act.

It is unnecessary surplusage to add section 352, Indian Penal Code, for the offence under section 323, Indian Penal Code. As the ingredients constituting an offence under section 352, Indian Penal Code, are practically covered by an offence under section 323, Indian Penal Code, I consider that the conviction under section 352, Indian Penal Code, is untenable.

In the result, both A-2 and A-3 are acquitted of the offence under section 352, Indian Penal Code. A-3 is acquitted of an offence under section 323, Indian Penal Code. So far as A-2 is concerned, in respect of the offence under section 323, Indian Penal Code, he is admonished under section 3 of the Probation of Offenders Act. Fine amounts, if any, paid by A-2 and A-3 will be refunded to them. The Criminal Revision Case is partly allowed and partly dismissed.

R.M. *Order accordingly.*

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1. (1955) S.C.J. 283: (1955) 1 M.L.J. (S.C.) 173: (1955) 1 S.C.R. 1150: (1955) 56 Cri.L.J. 526.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

J. L. Samuel .. *Petitioner**

Penal Code (*XLV of* 1860), *section* 304-*A and Indian Arms Act* (*LIV of* 1959), *sections* 3 *and* 25 (1)—*Accused a trained constable shooting birds with rifle —Bullet ricocheting and hitting another—Accused if guilty of rash and negligent act.*

The accused, an Armed Reserve Police Officer was shooting birds with his rifle near a Police Station and one of the bullets touched a water surface near by and after a spin ricocheted and hit a constable in the near by police station. The accused was convicted and sentenced for the offence of rash and negligent act and for an offence under the Arms Act as well.

Held: Though the police station was near the scene of occurrence and it might be irregular for the accused to have used a rifle for hunting, yet the accused being a person trained and experienced in shooting cannot be held guilty of rash and negligent act. Ricocheting of the bullet from the water surface is a sheer unforeseen accident. *Held* further the accused could not be said to have committed any offence under the Arms Act either in the circumstances of the case.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Tirunelveli Division at Tirunelveli dated 28th October, 1969 and made in C.A. No. 23 of 1968 (C.C. No. 249 of 1967 on the file of the Court of the Sub-Divisional Magistrate, Tuticorin).

N. T. Vanamamalai, G. Krishnan and *V. Gopinath*, for Petitioner.

The Assistant Public Prosecutor, for State.

The Court made the following

ORDER.—The revision petitioner was the Deputy Superintendent of Police, Armed Reserve, Palayamkottai. He was convicted under section 304-A, Indian Penal Code, and sentenced to undergo Rigorous Inprisonment for six months and to pay a fine of Rs. 1,000 and also under section 3 read with section 25 (1) (*a*) of Indian Arms Act and sentenced to pay a fine of Rs. 300, by the Sub-Divisional Magistrate, Tuticorin. The Sessions Judge, Tirunelveli, confirmed his conviction and sentence.

This is a very unfortunate case where a Police Constable doing duty at the Police Station was accidentally hit by a bullet fired by the petitioner,resulting in his death. Both the Courts have found that the death of the Constable was caused by the rash and negligent act of the petitioner. It was also found that he used a fire arm unauthorisedly.

The petitioner, during the relevant period, was the Deputy Superintendent of Police, Armed Reserved, Palayamkottai. On 16th December, 1966 he directed D.W. 1, the Additional Reserve Inspector, Armed Reserve to send for rifle from Tuticorin Police Station for the purpose of cleaning and zeroing. Accordingly, the latter sent the same. On 28th December, 1966, the petitioner obtained permission from P.W. 21 the then Additional Superintendent of Police, Trinelveli to remain at Headquarters on that day, it being his Silver Jubilee Wedding Anniversay Day. At about 1-30 P.M. that day ,the petitioner asked P.W. 1, a Police Constable attached to Armed Reserve, Palayamkottai, and who used to drive his private car, to get from the Armoury 22 rifle with the card board targets and also to accompany him with his own gun. The 22 rifle and two card board targets were accordingly brought by P.W. 1 and handed over to the petitioner. The petitioner secured a police lorry MDT 7403 from Palayamkottai for the purpose of going to Tuticorin at about 2-45 P.M., and he along with his brother, his children and P.W. 1 got into the lorry

*Crl.R.P. No. 1193 of 1969.
Crl. R.P. No. 1278 of 1969. 9th December, 1969.

and proceeded for about five miles from Palayamkottai and then the lorry was stopped for the purpose of shooting some birds, probably for dinner. The lorry was driven by P.W. 1. The petitioner and P.W. 1 got down and shot some birds. From there, the lorry proceeded for about 1½ furlongs west of Murappanad when the petitioner shot another bird on the northern side of the road. From there again, the lorry was taken towards east and it was stopped again at a place south of the Police Station at Murappanad as directed by the Petitioner. A crane was found moving from east to west on the ridge of a field in between the road and Murappanad Police Station on the north. The petitioner shot at it with M.O. 1 rifle through the aperture provided therefore in the lorry from a height of about 15 ft., the bird being at a distance of about 115 feet. The shot missed the bird. The bird flew. The bullet flew into the Police Station on the north through the open window and hit Muthukrishnan P.C. 262 who was working there as Station Writer. He sustained an injury on the left side. The petitioner on being informed about this, took the injured to Dr. Tayal Gnanamuthu and then to the hospital at Palayamkottai. The constable, however died on 3rd December, 1966.

The petitioner contended that he shot a crane from the aperture, that he was not rash or negligent in doing so as he himself was trained in shooting and that he was a good marksman. He further contended that he had taken the rifle for the purpose of zeroing and correct and, therefore, it cannot be said that he committed an offence under the Arms Act.

It is admitted that the petitioner shot the bird at a distance of 115 feet away from his and from a height of 15 feet. through the aperture. It is clear that the bullet released from the rifle hit the deceased constable. The appellate Court found that the bullet did not hit the Constable directly after it was released from the rifle but it fell on the water, touched the water surface and got into it with a spin and the bullet ricocheted and flew from the water surface and hit the deceased. In spite of this finding, the appellate Court confirmed the conviction holding that he was rash in having shot the bird knowing that the Police Station was near by. The appellate Court has also discussed about the case law in respect of culpability of a person in such circumstances. It is quite irrelevant to look to case law as on the finding the Sessions Judge, it cannot be said at all that when the bullet had hit the deceased as a result of ricocheting, it was due to rash or negligent act. No one can foresee when he shoots a bird straight at it that the bullet were likely to fall on water and from the surface of water after a spin would rebuff and hit a person at the Police Station. If the shooting was done by an incompetent person at that place where the Police Station was so near, it can be said without any difficulty that the act by such a person will amount to a rash act. It is not the case of the prosecution that the petitioner is not trained in shooting. The very fact that he has been in the Armed Reserve, would indicate that he should have had very good training and experience in shooting. I am, therefore of the view that though the Police Station was near the scene of occurrence, yet, the petitioner being a trained man in shooting, if he had shot a bird, it cannot be said that he was rash or negligent in so doing. Ricocheting of the bullet from the water surface is a sheer unforeseen accident. It is of course unfortunate that the Constable died. In any event, the petitioner will be entitled to the benefit of doubt. He is acquitted under section 304-A Indian Penal Code. Even under the Arms Act, I do not think that the conviction can be sustained. He is after all an official who is in charge of the Armed Reserve. He was celebrating his Silver Jubliee Wedding Anniversary Day. He had gone with his family and children for hunting birds and holidaying. Though it may be irregular for the petitioner to have used the rifle for hunting, it cannot be said that he had committed the offence. He is acquitted even under the Arms Act.

In the result, the revision petition is allowed and the petitioner is acquitted. His bail bond is cancelled. The fine amount, if paid, will be refunded to him.

R.M. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

Rajalakshmi .. *Petitioner**

v.

Kothandapani Pillai .. *Respondent.*

Criminal Procedure Code (V of 1898), *section* 488—*Right to maintenance—Spouse a lunatic —If could claim maintenance—Right, if affected by the provisions of Lunacy Act (IV of* 1912).

Lunacy Act (IV of 1912), *sections* 15 *and* 90—*Wife, a person of unsound mind—Right to claim maintenance—If can resort to section* 488, *Criminal Procedure Code or has to follow the specific provision under the Lunacy Act.*

It is clear from section 90 of the Indian Lunacy Act, 1912, that the provisions of section 488, Criminal Procedure Code. Hence the right of a wife, even if she is a lunatic, to claim maintenance from her husband under the Code of Criminal Procedure is not affected by the Lunacy Act. Section 15 of the Lunacy Act could have no application to such a case.

Petition under sections 435 and 439 the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Additional First Class Magistrate Vellore dated 30th December, 1967 and made in M.C. No. 353 of 1967.

Miss Nalani for *S. Ramalingam* and *M. Krishnappan*, for Petitioner.

The Court made the following

ORDER.—This revision petition raises an interesting question of law. The petitioner herein is one Rajalakshmi who is an insane person. She is represented by her next friend, the natural father Murugesa Pillai, who filed a petition praying that the respondent (Kothandapani Pillai) may be directed to pay a monthly allowance of Rs. 100 for her maintenance from the date of the application, namely 27th October, 1967. The main averments in her petition are that she was married 27 years ago to the respondent. They lived together for 10 years and they begot a son. There is no maintenance amount claimed for and on behalf of the son. About 17 years back he married a second wife. Subsequently the petitioner lost her mental capacity. She was given medical treatment in the house of her husband and also in the house of her parents. Her condition did not improve. The respondent did not take any interest in her and neglected the petitioner and finally brought her down to the house of her parents and left her there. Since then she has been under the care and protection of her father. Her case is that her husband-respondent herein has got to provide for her maintenance.

On behalf of the respondent a preliminary objection was raised about the maintainability of the petition. The respondent's objection is that proceedings must be taken under the Lunacy Act and not under section 488, Criminal Procedure Code, which does not provide for any action in the case of a lunatic wife. This objection appears to have been upheld by the Additional First Class Magistrate, Vellore on the basis of the interpretation placed on section 15 (1) of the Indian Lunacy Act, 1951 which provides for action in a different set of circumstances found in the said section itself. There was no justification for the First Class Magistrate to accept the position that in the circumstances mentioned in the petition for maintenance there is any justification to have recourse to section 15 of the Indian Lunacy Act. In my view the section is inapposite and the said section is misapplied to the position of the petitioner made out by the averments in the maintenance petition. Section 90 of the Indian Lunacy Act reads as follows:

"The liability of any relative or person to maintain any lunatic shall not be taken away or affected by any provision contained in this Act."

* Crl. R.C. No. 375 of 1968,
Crl. R.P. No. 369 of 1968. 7th January, 1970.

Therefore it is very clear that the provisions of the Indian Lunacy Act (IV of 1912) do not have any overriding effect over the provision of section 488, Criminal Procedure Code. In short the provisions of this Act do not render section 488, Criminal Procedure Code, *otiose*. I accept the argument of the learned Counsel Miss Nalini in this case. The point of law advanced by her is substantial. The revision petition is allowed.

The Additional First Class Magistrate, Vellore, is directed to proceed with the enquiry in this petition as expeditiously as possible.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

R. Thangavelu .. *Petitioner**

v.

Bhahadur Sheriff .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10—*Eviction of tenant—Notice to quit—Tenant incurring forfeiture of lease by denial of title—Tenancy if should still be terminated by separate notice to quit.*

Transfer of Property Act (IV of 1882), *sections* 106 *and* 111—*Forfeiture of lease by tenant's denial of landlord's title—If* ipso facto *determines the tenancy—Notice to quit—If necessary.*

It is now settled law that so long as the contractual tenancy is not terminated in the manner provided by section 106 read with section 111 (*h*) of the Transfer of Property Act, the tenant is protected in his possession and the landlord cannot evict him by resort to eviction proceedings under the Rent Control Act. It is only after the expiration of the contractual tenancy either by efflux of time or by notice of termination that the field becomes open for the landlord to get over the statutory protection to the tenant by resorting to and establishing the grounds provided by the Act for eviction.

It is no doubt true that denial of the landlord's title by the tenant is a ground of forfeiture of the lease. But even the denial of the title of the landlord by the tenant or the act of the tenant in claiming title in himself is by itself not sufficient, though it will certainly provide a ground (*viz*.,) forfeiture, to determine the tenancy. Under section 111 (*g*) of the Transfer of Property Act in addition to the forfeiture of the lease by the tenant on one or other of the grounds mentioned therein, the lessor or his transferee should give notice in writing to the lessee of his intention to determine the lease on account of the forfeiture.

In the absence of a determination of the tenancy by notice in writing on the ground of forfeiture as required under section 111 (*g*) or under section 111 (*h*) complying with the requirements of section 106 of the Transfer of Property Act, the contractual tenancy will continue to subsist and the landlord cannot get an eviction order under section 10 of the Rent Control Act.

Petition under section 25 (1) of Act XVIII of 1960 praying the High Court to revise the order of the Court of Small Causes (Third Judge) Madras dated 6th April, 1968 and passed in HRA No. 342 of 1967 (HRC No. 4828 of 1966 on the file of the Court of Small Causes, (Sixth Judge), Madras.

K. Kumaraswamy, P. Kannan and *Suryanarayana Rao*, for Petitioner.

Inamdar Abdul Salam, Inamdar Abdul Quyyoam and *A. S. Bibi John*, for Respondent

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*C. R. P. No. 966 of 1968 9th September, 1969.

The Court delivered the following

JUDGMENT.—Petitioner Thangavelu seeks to revise the judgment and decree of the Appellate Authority in HRA. No. 342 of 1967 on its file, confirming the order of the Rent Controller in HRC. No. 4828 of 1966 on his file, directing the eviction of the petitioner on the ground of wilful default in the payment of rent from 1st May, 1966 to 30th September, 1966 at the rate of one rupee per day. The petitioner denied the title of the respondent. His case is that the respondent put up the northern superstructure and he put up the southern half of the superstructure of the premises in question and that he has let out three rooms with thatched roofing behind the southern half portion. But the case of the respondent was that he put up the entire superstructure of the premises at his cost and that he has let out the premises occupied by the petitioner for running a Tea shop. Each party examined five witnesses in support of his case, apart from adducing documentary evidence. The Courts below accepted the case of the respondent that the petitioner is his tenant and in doing so they relied among other things, on the notice (Exhibit P-2) sent by the petitioner through his advocate admitting that he is a tenant of the respondent. But in a subsequent notice the petitioner has attempted to explain it as a mistake committed by his advocate and that it referred only to the arrangement to pay electricity charges. He denied having executed the lease agreement, Exhibit P-11, but that plea was not also accepted by the Rent Controller or the Appellate Authority. They found that the denial of the title of the respondent by the petitioner is not *bona fide* and that in view of the wilful default in the payment of rent the petitioner is liable to be evicted. I see no ground to interfere in revision with the said findings of fact which are not vitiated by any error of jurisdiction or of law.

The learned Advocate for the petitioner, however, relied on the decision in C.R.P. No. 2542 of 1965 rendered on 11th September, 1969. It has been held in that case that so long as the contractual tenancy is not terminated in the manner provided by section 106 read with section 111 (*h*) of the Transfer of Property Act, the tenant is protected in his possession and the landlord cannot evict him, with the necessary corolarry that there is no need for the tenant to seek protective refuge under the Rent Control Act of 1960 and that the landlord cannot, during the subsistence of the tenancy, resort to eviction on grounds provided by that Act irrespective of the protection available to the tenant under the subsisting contractual tenancy. It has been further observed in that decision that there is nothing in the said Act which expressly or by necessary implication abrogates the general law relating to the necessity to terminate the contractual tenancy before proceedings in ejectment can be initiated, and that it is only after the expiration of the contractual tenancy either by efflux of time or by notice of termination that the field becomes open for the landlord to get over the statutory protection to the tenant by resorting to and establishing the grounds provided by the 1960 Act for eviction. As a single Judge, I am bound by this Bench decision.

The learned Advocate for the respondent rightly urged that the lease of immoveable property could be determined in any one of the modes prescribed in section 111 of the Transfer of Property Act and that by virtue of clause (*g*) of section 111 of the Act disclaimer or denial of the landlord's title is a ground of forfeiture. This is well recognised both in English common law and in India, and it is clear from the findings of the Rent Controller and the Appellate Authority that the denial of the title of the landlord by the petitioner-tenant in this case is not *bona fide*. But even the denial of the title of the landlord by the tenant or the act of the tenant it claiming title in himself is by itself not sufficient, though it will certainly amount to forfeiture of the lease, to determine the lease. Under section 111 (*g*) of the Transfer of Property Act, in addition to the forfeiture of the lease by the tenant on one or the other of the grounds mentioned therein, the lessor or his transferee should give notice in writing to the lesee of his intention to determine the lease on account of the forfeiture. The respondent-landlord has not, in any of his notices, referred to the forfeiture of the lease on the ground of denial of his title or the petitioner

asserting title in himself, and determined the lease. In the absence of such determination of the lease either by notice in writing to the lessee of the landlord's intention to determine the lease on the ground of forfeiture as required under section 111 (g) or by giving notice under section 111 (h) complying with the requirements of section 106, the contractual lease will continue to subsist and the respondent cannot get an order of eviction in view of the Bench decision.

The order of eviction passed against the petitioner is, therefore, set aside. It is needless for me to state that it is open to the respondent to give the necessary notice if he wants to evict the petitioner and take such steps as he may be advised. In view of the facts and circumstances of the case, I direct the parties to bear their own costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M. M. ISMAIL.

K. R. Subbaier, Tape Factory, Mettu Street, Woraiyur, Tiruchi .. *Petitioner**

v.

The Regional Provident Fund Commissioner, 111, Mount Road, Madras-6. .. *Respondent.*

Employee's Provident Funds Act (XIX of 1952), section 7-A—Scope—Power of the Commissioner under—If can waive or remit any claim for contribution to the fund on the ground of hardship in particular cases of the employee having left the service.

Section 7-A of the Employees' Provident Funds Act gives power to the authorities mentioned therein to determine the amount due from an employer under the provisions of the Act after giving an opportunity to the employer. But there is no provision in the Act enabling the authorities to remit or waive the employer's share of contribution to the Provident Fund for any period (pre-discovery period) on the ground of hardship or oppressiveness as the result of any employee having left the service or retired or dead.

Where an establishment comes within the purview of the Act it is the statutory obligation of the employer to contribute to the fund without waiting for any notice from the Regional Provident Fund Commissioner. The fact that the employer failed in his duty to contribute and the default was discovered by the authorities later does not mean that the employer's contribution to the fund should be waived for the pre-discovery period merely because the employee has either left the service or retired or died before the discovery by the authorities of the default of the employer to contribute to the fund. Far from it under the scheme of the Act and the rules the authorities will be justified in demanding the contributions even in respect of employees who have left the service.

Regional Provident Fund Commissioner v. *Subbaier Tape Factory*, I.L.R. (1967) 2 Mad. 606 : (1966) 2 M.L.J. 403, discussed and explained.

Aluminium Corporation of India Ltd. v. *Regional Provident Fund Commissioner*, A.I.R. 1968 Cal. 570, differed.

The fact that section 7-A gives an opportunity to the employer to show cause against any levy does not mean that he is entitled to claim any remission on the ground of hardship, a relief which the authorities under the Act are not empowered to grant.

(Administration charges in such cases may be claimed only in respect of the employer's share of contribution and not on the employee's share which was neither demanded nor collected).

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* W.P. No. 2750 of 1967. 21st August, 1969.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of *Certiorari* calling for the records relating to the order of the respondent herein dated 8th March, 1967 in No. B/M/D 598 Regional and quash the said order and made therein.

M. Manivannan, for *K. K. Venugopal* and *S. Ramalingam*, for Petitioner.

S. Ramasubramaniyam, Central Government Standing Counsel, for Respondent.

The Court made the following

ORDER.—The petitioner herein runs a fctory from 1942 for manufacturing tapes, lampwicks, etc. with more than fifty persons in his employ. At an anterior stage, the petitioner disputed the fact that the provisions of the Employees' Provident Funds Act, 1952 (XIX of 1952) hereinafter referred to as "the Act" would apply to the firm, and the question was settled only when the Central Government passed an order on 29th September, 1958 under section 19-A of the Act holding that the Act applied to the petitioner's firm. It is thereafter that the petitioner filed Writ Petition No. 888 of 1959 on the file of this Court challenging the order of the Regional Provident Fund Commissioner, the respondent herein, demanding from the petitioner the payment of (1) the employer's share of the contribution to the Provident Fund from 1st November, 1952 (the date on which the Provident Fund Scheme framed under the Act became applicable to the firm) upto 30th April, 1957, (the date when the petitioner was called upon to pay the contribution by a notice); (2) administrative charges in full, calculated on both the employees' and employer's share of the contribution to the provident fund (under Clause 39 of the Provident Fund Scheme read with the notification of the Government dated 31st October, 1952, the percentage of administrative charges payable by the employer was fixed at 3 per cent. of the total employer's and employees' contribution); and (3) damages for default calculated at 6¼ per cent. per annum from the date on which the arrears fell due, upto the date of remittance (under section 14-B of the Act, a maximum of 25 per cent. of the amount of arrears can be fixed as damages). The petitioner submitted in the Writ Petition that the claim for the back period was unsustainable and the provisions of the Act and the Scheme did not contemplate such retrospective levy. Jagadisan, J., following the decision of the Calcutta High Court of a single Judge, Mukherji, J., reported in *Aluminium Corporation of India Ltd.* v. *Regional Provident Fund Commissioner*[1], upheld the contentions of the petitioner, and directed the issue of a writ of *mandamus* against the Regional Provident Fund Commissioner to forbear from making collections from the petitioner by levy of contributions and management expenses for the period from 1st November, 1952 to 30th April, 1957. I may here point out that the period from 1st November, 1952 to 30th April, 1957 was called pre-discovery period because the notice was issued only on 30th April, 1957. With regard to the claim for damages, the learned Judge accepted the contention of the respondent that the claim for damages had not yet been settled, but was under investigation, and therefore did not grant any relief with regard to it. Against the Judgment of the learned Judge, writ Appeal No. 80 of 1962 was preferred by the respondent herein, and that came to be disposed of by a Bench of this Court consisting of Anantanarayanan, O.C.J. as he then was and Ramakrishnan, J., by a judgment dated 20th January, 1966. This judgment is reported as *Regional Provident Fund Commissioner* v. *Subbaier Tape Factory*[2],

The learned Judges elaborately went into the provisions of the Act as well a the scheme and came to the conclusion as follows:

"It appears to us, on the other hand, with due respect to the learned Judge that there is considerable force in the contrary view which holds that the main purport of the Act and the Scheme framed thereunder is to bring into existence a compulsory provident fund applicable to all industries to which the Act applies,

1. A.I.R. 1958 Cal. 570.
2. I.L.R. (1967) 2 Mad. 606 : (1966) 2 M.L.J. 403.

with effect from the date when the scheme has been declared applicable to them. The principal duty is laid upon the employer to put the scheme into operation forthwith, and to make the contributions of both the employer's and employees' for the purpose of adjusting it against the amount, which they had paid to the fund in advance. In Clause 26 of the scheme extracted earlier, the words used are 'every employee shall be *entitled and required* to become a member of the Fund.' In the context of the Act, the word 'entitled' means that the employee has got an absolute right to get the benefits of the Act. The word 'required' implies an obligation on the employer to treat all the employees, who are qualified and who are not exempted, as members of the fund, and to pay the contribution to the fund (both the employers and the employees) from the date of the coming into force of the scheme without allowing any interval to lapse either for the awaiting of a notice of demand from the Provident Fund Commissioner or for clearing a point of doubt or difficulty by getting an order from the Central Government under section 19-A."

The learned Judges then went into the meaning of the word "required" with reference to the dictionaries and authorities and came to the conclusion that it meant a mandate or a command. The learned Judges then observed as follows :

"In view of the obligatory nature of the provisions of the Provident Fund Act and the scheme framed thereunder, giving no choice to the employer to postpone the application of its provisions, it appears to us that the word 'required' in Clause 26 of the scheme, has to be given a mandatory and not a directory meaning, and that it implies an obligation whose effect is that every employee who is not exempted, and who, satisfied the required qualification of service, automatically becomes a member of the fund from the date of the coming into force of the scheme".

The learned Judges again point out as follows :

"If there is a rule which casts automatically upon the employer, as the Act does, the obligation to make the contribution, there is no logic in fixing the date of the notice by the provident Fund Commissioner as the starting point, for making a valid claims. On the other hand, the Provident Fund Commissioner might have had more than one reason for the delay in the issue of notice. He might not have an adequate staff to make a speedy investigation in respect of every factory in his jurisdiction, or the investigation might have taken a long time. In such circumstances, an indifferent or recalcitrant employer, who deliberately ignores the provisions of the Act, cannot urge, that he was awaiting the issue of a notice from the Provident Fund Commissioner, for the purpose of implementing the Act and the scheme in his establishment, and should therefore be given relief for the period prior to the issue of the notice."

A consideration which greatly influenced Mukherji, J., of the Calcutta High Court as well as Jagadisan, J., of this Court was that if a demand is made in respect of the pre-discovery period, that may prove to be oppressive and harsh in the sense that certain employees might have left the service of the employer or might have retired or dead. Dealing with that consideration, the learned Judges point out that the question of hardship which weighed with Mukherji, J., and Jagadisan, J., cannot have much substance subsequent to the amendment which incorporated section 7-A into the Act in 1963. The learned Judges pointed out that that section give an opportunity to the employer to press his objections before the authorities mentioned therein to any claim for payment made against him, and this will include the ground that it is oppressive or unjust in nature. In their opinion, it is in the course of such an enquiry that an individual case of hardship should be pleaded, and relief obtained, for example, regarding employees who have left the service during the pre-discovery period, employees who have been dismissed, employees who are dead, and employees in whose cases the employer did not have an adequate opportunity to recover their contributions. With regard to the claim for administrative

charges, the learned Judges pointed out that though the claim is clearly admissible, it might not be admissible in respect of employees' contribution which has been given up by the respondent himself. In relation to the question of hardship as well as damages, the learned Judges again point out as follows:

"What transpires from the above is that it will not be legitimate to infer a default, merely because there was no payment by the employer of the contribu tion during the pre-discovery period. Each case must be examined carefully with respect to its own facts, for an inference about the default. Section 7-A of the Act has provided for such an examination in disputed cases. The amendment introducing section 7-A came after the passing of the present orders now in appeal. Therefore, we will remit the claim for damages to a fresh consideration by the appropriate authority under section 7-A of the Act. Likewise, other difficulties in the enforcement of the demand, for example, claims in respect of persons who have left the employment or persons who have died or whose whereabouts are not known and persons who have been dismissed, should all be the subject matter of a detailed claim and consideration by the authority under section 7-A on application made to it for that purpose, and a fresh opportunity will have to be given to the petitioner for obtaining such a relief, in view of the enactment of section 7-A after the orders now in dispute had been passed."

In the result, the learned Judges allowed the Writ Appeal, set aside the order of Jagadisan, J., issuing a writ of *mandamus* and observed that it will be open to the petitioner to urge a claim for necessary reliefs, including claims in respect of damages and also in respect of contribution relating to individuals like those who have left the employment, and so on during the period from 1st November, 1952 to 30th of April, 1957 in an application to be filed before the appropriate authority under section 7-A.

After the disposal of the appeal, after giving an opportunity to the petitioner the respondent herein passed a fresh order. As far as the damages are concerned, under section 14-B of the Act, it has to be determined by the appropriate Government and that section gave a discretion to the said appropriate Government. the stage when Jagadisan, J., dealt with the writ petition, no orders with regard to damages had been passed and therefore the learned Judge did not issue any direction with reference thereto. During the pendency of the writ appeal also no order with regard to damages was passed. It is under these circumstances, the respondent herein subsequent to the disposal of the writ appeal has not passed any orders with regard to damages, and naturally if and when the appropriate authority contemplated by section 14-B of the Act comes to pass an order for damages, that authority will have to take into consideration, the observations of this Court in the judgment in the writ appeal, as well as any objections that may be put forward by the petitioner herein, On the other hand, the present writ petition praying as it does for the issue of a writ of *Certiorari* to quash the order of the respondent dated 8th March, 1967 is in essence confined to the conclusion of the respondent that no remission with regard to the employer's contribution for the pre-discovery period could be given under the provisions of the Act, and to the claim for administrative charges. The impugned order is not clear as to what exactly is the basis on which the administrative charges are claimed. However, Mr. Ramasubramaniam, learned Counsel for the respondent states that the claim for administrative charges is only in accordance with the judgment of this Court in the writ appeal, namely, only on the amount of employer's contribution for the pre-discovery period and not on the employees' contribution which was not demanded or recovered. Now the substantial question which arises for consideration in relation to the impugned order of the respondent is with regard to the damand for payment of the employer's share of contribution to the provident Fund for the pre-discovery period in respect of all the employees of the petitioner irrespective of the fact whether they had retired or ceased to be in service or died in between 1st November, 1952 and 30th April, 1967. With regard to these aspects, in the

impugned order, the Regional Provident Fund Commissioner pointed out that for the period from 1st November, 1952 to 30th April, 1957 the employer, namely, the petitioner is statutorily liable to pay the employer's share of contributions for all persons who became eligible for membership as stipulated in para 26 of the scheme, and it is immaterial whether the employee has subsequently died or had left service and it is obligatory on the part of the employer to remit his share of contributions even in respect of such persons. He further pointed out that it was the responsibility of the Regional Provident Fund Commissioner to see that the amount is paid in respect of persons who had left or died, and that it was open to a member to claim the employer's share of contributions from the place where he is residing or working and it was the duty of the Provident Fund authorities to pay the amounts to the members who had left the service. He further pointed out that under the Death Relief Fund Scheme, in respect of persons who had died, the organisation is obliged to make lump sum payment to the extent of Rs. 500 to the nominees or legal heirs of the deceased even though the contribution paid by the employer or both put together falls short of Rs. 500. The only complaint of Mr. Manivannan, learned Counsel for the petitioner is that in passing the impugned order, the Regional Provident Fund Commissioner had not given effect to or acted according to the injunctions of this Court in its judgment in the writ appeal. Learned Counsel relies upon the passages extracted above by me from the judgment with reference to section 7-A of the Act and contends that the learned Judges contemplated that the petitioner can obtain relief in respect of the employer's share of contribution to the Provident Fund for the pre-discovery period in an enquiry under section 7-A of the Act. On the other hand, the Regional Provident Fund Commissioner, the respondent herein, has taken the stand that under the statute, there is no scope for granting any such relief.

For the purpose of understanding and disposing of this argument, it is necessary to refer to section 7-A of the Act, as well as to the legal consequences flowing from the application of the provisions of the Act as well as the scheme to a particular establishment. Section 7-A is as follows:—

"(1) The Central Provident Fund Commissioner, and Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may by order, determine the amount due from any employer under any provision of this Act or of the scheme and for this purpose may conduct such inquiry as he may deem necessary.

(2) The Officer conducting the enquiry under sub-section (1) shall, for the purposes of such inquiry, have the same powers as are wested in a Court under the Code of Civil Procedure, 1908 (V of 1908) for trying a suit in respect of the following matters, namely :

(*a*) enforcing the attendance of any person or examining him on oath;

(*b*) requiring the discovery and production of documents;

(*c*) receiving evidence on affidavit;

(*d*) issuing commissions for the examination of witnesses;

and any such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purpose of section 196 of the Indian Penal Code (XLV of 1860)

(3) No order determining the amount due from any employer shall be made under sub-section (1) unless the employer is given a reasonable opportunity of representing his case.

(4) An order made under this section shall be final and shall not be questioned in any Court of law,"

Thus, it will be seen that section 7-A (1) gives power to the authorities mentioned therein to determine the amount due from an employer under any of the provisions of the Act. Sub-section (3) of that section imposes an obligation on the authority to give an opportunity to the employer before determining the amount. I asked Mr. Manivannan, the learned Counsel for the petitioner to bring to any notice any provision in the Act or in the scheme under which the Regional Provident Fund Commissioner has got power or authority to remit or waive the claim for employer's share of contribution to the Provident Fund for the pre-discovery period on the ground of hardship or oppressiveness based upon any particular employee having left the service or retired or died. The learned Counsel was not able to draw my attention to any such provision either in the Act or in the scheme, and he contented himself by repeating that the learned Judges of this Court when they disposed of the writ appeal contemplated such a relief being obtained. I am unable to accept this interpretation of the learned Counsel of the Bench judgment of this Court in the writ appeal. I have extracted enough from that judgment to show that the learned Judges were of the view that when once the factory came within the scope of the Act and the scheme, from 1st November, 1952 onwards the employer was under a statutory obligation, without any notice from the authority, to make his share of the contribution to the fund. If that is so, I am unable to agree with the contention of the learned Counsel for the petitioner that the learned Judges contemplated at that time that there is any power in the Regional Provident Fund Commissioner to waive such an amount which statutorily the employer is under an obligation to pay, simply because he was of the view that there is any hardship or oppression involved in a particular case. As I pointed out already, section 7-A (1) of the Act merely refers to the determination of the amount due under any of the provisions of the Act, and so long as the employer's share of the contribution is due under the provisions of the Act, section 7-A can have nothing whatever to do with the waiver or remission of any such amount, and admittedly neither the Act nor the scheme confers any power on the authorities to waive any such amount. It is one of the basic principles of administration of law that the creature of a statute will have to function within the four corners of the statute, and it has no power or authority to do anything outside the scope of the statute, whether by way of imposing an obligation or by way of conferring a benefit or by way of making a remission. In all these matters, it is the statute that defines and circumscribes the power, jurisdiction and authority of the Officer concerned, and once on considerations of hardship or equity, a powert to go outside the statutory limits is recognised in any officer, that will mean the negation of the very principle of rule of law. Under these circumstances, and with reference to the observations of the learned Judges in the judgment in the writ appeal, I am unable to hold that the learned Judges were of the view that the Regional Provident Fund Commissioner had power to waive the demand for payment of the employer's share of contribution to the Provident Fund for the pre-discovery period simply on the ground that during that period an employee ceased to be in service, or retired or died. On the other hand, the reasons given by the Provident Fund Commissioner, to which I have already made a reference, for demanding payment of contribution to the provident fund even in respect of those persons who had left the service or died, will be valid, and nothing was brought to my notice by the learned Counsel for the petitioner to show that those reasons were not warranted by the terms of the statute or the scheme as the case may be. As a matter of fact, the respondent himself has rightly pointed out in his order that the High Court order only directed the appropriate authority to consider the reliefs that could be given in respect of those persons who had left the service or died, and as there is no provision in the law to give such a relief in respect of the employer's share of the contribution to the Provident Fund, the respondent was unable to grant any further relief to the establishment.

One other aspect must be made clear immediately. The learned Judges who delivered the Judgment in the writ appeal, nowhere in the judgment, state that the employer is not liable to make the contribution under the provisions of the Act or the scheme in respect of an employee who has retired from the service or died or

in question. Under these circumstances, I am unable to see any error in the impugned order either with reference to the legal position or with reference to any direction contained in the judgment of this Court in writ Appeal No. 80 of 1963. I may repeat that all that the learned Judges pointed out is that under section 7-A of the Act, the petitioner can put forward all his objections on the ground of hardship or oppression to the claim for the payment of the employer's contribution to the provident fund for the pre-discovery period, and nowhere the learned Judges say that the respondent was entitled to or competent to waive or give up the claim under provisions of the statute or the Scheme. It is too much to contend or hold that the learned Judges expected the respondent to do something which he cannot do under the statute or the scheme. Consequently, so long as the respondent has considered the objections of the petitioner and came to a conclusion of his own, which conclusion cannot be said to be illegal with reference to the previsions contained in the Act and the scheme, there is no justification whatever for interfering with that order. Under these circumstances, the Writ Petition fails and it is dismissed.

I must again point out that it has been specifically conceded before me by the learned Counsel for the respondent that the claim for payment of administrative charges was only based on the employer's share of contribution for the pre-discovery period and not on the employees' share which was not demanded or recovered. There will be no order as to costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

T. Linga Gowder .. *Appellant**

v.

State of Madras, represented by the District Forest Officer Ootacamund and others .. *Respondents.*

Contract Act (IX of 1872), sections 3, 4, 5, and 70—Madras Forest Act (V of 1882), as amended by Act (I of 1934), section 66 and Madras Revenue Recovery Act (II of 1864), section 52—Auction of leasehold right by District Forest Officer—Withdrawal of the bid before acceptance—No concluded contract — Suit for refund of earnest money deposited.

Contract—Auction—Bid—Only an offer—No contract if there was no acceptance—Conditional acceptance—Withdrawal before the absolute acceptance.

The plaintiff who was the highest bidder at the auction of a leasehold right made by the District Forest Officer, withdrew his bid before the same was accepted by the Officer and sued to recover the earnest deposit.

Held: In an auction every bid is an offer. It would bind the parties only when the offer was accepted.

Until an offer is accepted unconditionally, it creates no legal right and the bid can be withdrawn at any time. A conditional acceptance, if by that is meant some condition to be fulfilled for the acceptence of the contract to be binding, is not an acceptance that would turn an offer into a contract. The offer then is still under consideration awaiting acceptance that would bring about a contract.

In the absence of a valid contract between the plaintiff and the Government the claim for deficiency arising at a re-auction cannot stand. Equally the

* S.A No. 192 of 1965. 16th June, 1969.

Government cannot claim to retain the earnest money deposited by the plaintiff. Section 70 of the Contract Act is not attracted. Neither section 66 of the Madras Forest Act nor section 52 of the Revenue Recovery Act would enable the Government to recover the deficiency from the plaintiff as there was not in existence a concluded contract between the parties.

Case law discussed.

Appeal against the Decree of the Court of the Second Additional District Judge, Coimbatore, in Appeal Suit No. 43 of 1963, preferred against the decree of the Court of the Subordinate Judge of the Nilgiris at Ootacamund in Ordiginal Suit No. 220 of 1960.

C.M.P. No. 17410 *of* 1968.—Petition praying that in the circumstances stated therein and in the affidavit filed therewith, the High ourt may be pleased to receive the additional Memorandum of Grounds filed therein.

A. K. Sreeraman and *A. S. Kailasam*, for Appellant.

The Additional Government Pleader, for Respondents 1 and 2.

The Court delivered the following

JUDGMENT.—This Second Appeal raises an interesting question in the law of contracts. On 8th December, 1958, the District Forest Officer, Ootacamund Division, held an auction sale of the right to cultivate potatoe and vegetable crops along with blue-gum or wattle, in four plots of land, each plot measuring about 5 acres. The plaintiff in the suit out of which the Second Appeal arises, the appellant herein, was the highest bidder in the auction for the said four plots of land. He had to pay, under the terms of his bid for the four plots, Rs. 725, Rs. 775, Rs. 775 and Rs. 800 respectively per year as lease-amount. The lease was for a period of three years from 1st January, 1959 or from the date of the agreement to be executed in accordance with the conditions of the auction, whichever was earlier. The auction sale notice containing 36 conditions is exhibited as Exhibit B-1. Conditions 9 and 11 deal with the deposit of earnest money by an intending bidder. He has to make an earnest deposit of Rs. 100 before the commencement of the sale and he has also to sign the auction notice in token of acceptance of all the conditions. The earnest money deposited by unsuccessful bidders is returnable at the close of the auction sale and that of the highest bidder will be retained towards part of the lease amount. The highest bidder of each field should pay an earnest deposit of Rs. 100 before he is allowed to bid for another field. The plaintiff who has been the highest bidder in respect of the four plots, has deposited earnest money of Rs. 100 for each plot of land. Condition 15 lays down, that within ten days from the date of the receipt of the order confirming the sale, the successful bidder shall pay ¼ of the sale amount less earnest deposit in the District Forest Officer or in the Range Office concerned. The balance of the sale amount, namely, ¾ of the sale amount, should be paid in one instalment on or before 1st June, 1959. In case of default, the lessee would be given time upto a maximum of one month with interest at 6¼ per cent. from the date on which the instalment fell due. The District Forest Officer would evict the lessee, if there was default in the payment for more than one month and all the amounts paid by the lessee would be forfeited to the Government. Condition 15 (*a*) states that, if the last day for the payment of lease amount is a holiday or series of holidays, the lease amount shall be paid on the previous working day and the agreement should also be executed on the same day. There is a provision in condition 15 (*b*) that no extension or *voida* will be granted, if the execution of the agreement is delayed by the contractor. Also unless and until the security deposit is furnished and the agreement executed, no permission will be granted to commence work in the area relating to his contract. Condition 15 (*c*) stipulates that, if the lessee fails to execute an agreement in the prescribed form at the time of the payment of the lease amount, the earnest money deposit will be forfeited to the Government, the lease-hold right resold at his risk, and the lessee will be liable to make good the loss to the Government. In cases where resales are effected

the defaulting bidder will not be permitted to bid at the resale. Condition 30 relating to the confirmation of the sale is important. The sale is subject to confirmation by the District Forest Officer or the Conservator of Forests, Coimbatore Circle, as the case may be, who reserve to themselves the right to accept or reject the bid without assigning any reasons therefor. Under condition 32, all the money due by the successful bidder or contractor, as the case may be, under the terms of the sale notice or the agreement executed by him shall, if not paid by him, be recoverable from him under section 66 of the Madras Forest Act (V of 1882) as amended by Forest Act (I of 1934) by the attachment and sale of his property under Madras Act II of 1864 and any statutory modification thereof.

Admittedly, the auction sale in this case was held by the District Forest Officer, the 2nd defendant in the case. On the 19th of January, 1959, before the receipt of any order from the District Forest Officer confirming the sale of the leasehold right, the plaintiff, complaining that he had received no information in the matter and that the cultivation season had also passed, withdrew his bids and asked for the refund of the earnest deposit of Rs. 400. There was no response to this letter of the plaintiff withdrawing his bid, and without reference to the same, by proceedings dated 30th January, 1959 and 31st January, 1959, the District Forest Officer proceeded to confirm the plaintiff's bids and called upon him to execute agreements in the prescribed form. There is a separate confirmation order for each one of the four plots. Each order refers to the bid amount and requires the plaintiff to pay the balance due less the earnest deposit within 10 days of the receipt of the order in accordance with the conditions of the sale. The plaintiff refused to comply with the demands and the District Forest Officer proceeded to re-sell by public auction the leasehold right with regard to the four plots. By his letter, dated 3rd September, 1959, he intimated the plaintiff that the plots have been re-auctioned and that the plaintiff should pay a sum of Rs. 4,025, the loss sustained by the Government as a result of the re-sale, giving credit for the earnest deposit of Rs. 400. He initiated proceedings to recover the aforesaid amount under the Revenue Recovery Act through the Collector of Nilgiris. The plaintiff, thereupon, issued the necessary notice under section 80, Civil Procedure Code, and commenced action for a declaration that the proceedings of the State of Madras represented by the District Forest Officer, Coimbatore, and the coercive action initiated under the Revenue Recovery Act are illegal and unsustainable in law and for refund of the earnest money deposit of Rs. 400. The plaintiff took the stand that there was no completed contract in the case, and that, before due acceptance of his highest bid by confirmation in accordance with the conditions of the sale, he had withdrawn his bid. The learned Subordinate Judge, Nilgiris, upheld the plaintiff's contention that there was no concluded contract and granted him the declaration as prayed for and decree for the refund of the earnest deposit. On appeal, the learned District Judge, Coimbatore, took the view that there was a definite acceptance of the plaintiffs bid at the auction and the sale was confirmed by the authority concerned. On that view, he reversed the decree of the trial Court and dismissed the suit.

The argument of Mr. A. K. Sreeraman is to the following effect: There was no immediate acceptance by the District Forest Officer of the plaintiff's highest bid at the auction. Under the conditions of the auction sale the District Forest Officer or the Conservator of Forests, as the case may be, reserved to themselves the right to accept or reject the bid without assigning any reason and the sale is subject to confirmation. It was not signified in any manner at the time of the auction that the plaintiff's highest bid was accepted. There was, therefore, no concluded contract, and, before there was confirmation by the District Forest Officer, the plaintiff withdrew his bid. Even if in the circumstances the acceptance of the plaintiff's bid could he spelled out by implication. Article 229 (1) of the Constitution rules out implied contract with the Government. While reversing the decree of the trial Court, the learned District Judge says:

"The auction was held by the 2nd defendant..........At that auction, plaintiff's bid which was the highest was accepted. Under condition No. 30 the

sale was subject to confirmation by the District Forest Officer or by the Conservator of Forests, Coimbatore. On 30th January, 1959 the plaintiff was informed that the sale of the right to cultivate the plots with potato and vegetables was confirmed and the plaintiff was required to pay the balance of the lease amount.".

The reference to the acceptance of the plaintiff's bid at the auction sale in the judgment of the lower appellate Court is clearly an inference from the circumstances, because it is nobody's case, either on the evidence or pleadings, that the District Forest Officer intimated the plaintiff that his bid was accepted. The substantial defence is found in para. 10 of the written statement in the following words:

"The terms of the contract are complete and there has been a completed contract by the plaintiff accepting the terms of the conditions of sale, paying the earnest money and signing the bidder's list. No further choice is left in the plaintiff to rescind or resile from the obligations set out more fully in the terms and conditions of the lease auction."

The State wholly relies upon the fact of the plaintiff having accepted the conditions of sale and signed the bidder's list. According to the State, having taken part in the auction sale subject to the conditions, the plaintiff was precluded from rescinding the contract. Here, when the District Forest Officer put up in auction the leasehold right, he invited offers and every bid was an offer. It would bind both the parties only when the offer was accepted. Quite often, the auctioneer reserves a right as part of the conditions of sale that even though the bid is the highest one, at his discretion he may not accept it. Before final acceptance of the bid or falling of the hammer, it is always open to the bidder to withdraw his bid. It is also well established that a condition stipulating that a bid shall not be retracted, has no force unless it is supported by consideration or is founded on statutory authority—see *Somasundaram Pillai* v. *Provincial Government of Madras*[1]. The short question for consideration is whether there has been acceptance of the plaintiff's bid before withdrawal of the same, to constitute a contract in this case.

The auction sale notice in this case states that the auction sale would be by the District Forest Officer or by an Officer authorised by him. Condition 30 of the sale notice provides that the sale would be subject to confirmation by the District Forest Officer or the Conservator of Forests, as the case may be, who reserve to themselves the right to accept or reject the bid without assigning any reason. Does this condition mean that, when the auction sale is held by the District Forest Officer, there must be confirmation of the sale by the Conservator of Forests or when the auction sale is held by an officer authorised by the District Forest Officer, there must be confirmation of the sale by the District Forest Officer? This question was not mooted in the Courts below and the position was not made clear. No rules or administrative instructions when the sale should be confirmed by the Conservator of Forests, have been placed on record. The case proceeded in the Courts below and before me on the assumption that the District Forest Officer was competent to accept and confirm a bid. Having regard to the defence set out above, it seems to me that the District Forest Officer, even if he conducts the auction sale himself is not bound to accept the bid then and there. The offer could be accepted subsequently by an order of confirmation. He may deliberate whether the highest offer could be accepted. He may suspect that, in a particular case, there was a ring formed by bidders in combination to keep down the bid. Whatever may be the reason behind the reservation there is a specific condition in the auction sale notice that the sale is subject to confirmation. Manifestly, there is no absolute acceptance when the highest bid is reached and the auction is closed. The auction sale is finalised only by issuing an order of confirmation. Can it be said that both the parties are bound by the contract pending the order of confirmation? Under one of the conditions in the auction sale notice, within 10 days of the receipt of the

1. I.L.R. (1947) Mad. 837 : (1947) 1 M.L.J. 123 : A.I.R. 1947 Mad. 366 at 368.

confirmation order an agreement has to be executed and part of the lease amount paid. Can it be said in law that, before confirmation of sale, the obligation of the plaintiff to make deposit of the lease amount arose? Is there anything in the subsequent conduct of the concerned authority prior to the confirmation order that the highest bid was accepted? Can it be contended, in the face of condition 30, that the Government cannot withdraw and refuse to confirm the highest bid? In my opinion, it could not be. If that is the position, where is the concluded contract? Even if the District Forest Officer made up his mind to accept the bid, that is not sufficient to bring about contractual relationship between the plaintiff and the Government. The acceptance must be communicated in some perceptible form. There is here no evidence of any hammer falling down signifying acceptance.

In *Bhagwandas* v. *Girdharlal & Co.*[1], it is observed:

> "A contract unlike a tort is not unilateral. If there be no "meeting of minds" no contract may result. There should, therefore, be an offer by one party, express or implied, and acceptance of that offer by the other in the same sense in which it was made by the other. But an agreement does not result from a mere state of mind: intent to accept an offer or even a mental resolve to accept an offer does not give rise to contract. There must be intent to accept and some external manifestations of the intent by speech, writing or other act, and acceptance must be communicated to the offeror, unless he has waived such intimation or the course of negotiations implies an agreement to the contrary."

A mere resolve on the part of the offeree to accept an offer, when there is no external manifestation of the intention to do so, cannot result in an enforceable contract.

The decision in *Rajanagaram Village Co-operative Society* v. *Veeraswami Mudaly*[2], relied upon by the learned District Judge in this case, has been considered at length by me in the *Municipal Council, Karur* v. *Pasupathi Muthu Raja*[3], where I have pointed out that it does not run counter to the statement of law in Pollock and Mulla's Indian Contract Act, and that, if acceptance is conditional, the offeror can withdraw it at any moment until absolute acceptence has taken place. I have stated therein:

> "Only a concluded contract can bind both the parties and for such a contract to come into existence, the offer and related acceptance must be absolute and not qualified or conditional."

As I observed there, there can be no two views about it, that conditional acceptance, if by that is meant some condition to be fulfilled for the acceptance of the contract to be binding, is not an acceptance that would turn an offer into a contract. The offer then is still under consideration awaiting acceptance that would bring about a contract. In Pollock and Mulla's Indian Contract, 8th edition, at page 45, the authors express the position thus:

> "An acceptance is either absolute or conditional. There is no half way house between the two, if an acceptance is conditional, the offeror can withdraw it at any moment until an absolute acceptance has taken place."

In *Somasundaram Pillai* v. *Provincial Government of Madras*[4], the Division Bench observed:

> "To have an enforceable contract there must be an offer and an unconditional acceptance. A person who makes an offer has the right of withdrawing it before acceptance, in the absence of a condition to the contrary supported by consideration. Does the fact that there has been a provisional acceptance, make any difference? We can see no reason why it should. A provisional acceptance cannot in itself make a binding contract. There must be a definite acceptance or the fulfilment of the condition on which a provisional acceptance is based."

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1. (1966) 1 S.C.R. 656 : A.I.R. 1966 S.C. 543.
2. (1950) 2 M.L.J. 486.
3. I.L.R. (1969) 1 Mad. 124 : (1969) 1 M.L.J. 394 at 398.
4. I.L.R. (1947) Mad. 837 : (1947) 1 M.L.J. 183 : A.I.R. 1947 Mad. 266 at 367.

That is no doubt, a case of auction sale of liquor shop licence where the officer who conducted the auction had no authority to accept the bid. But the Division Bench was concerned with the principles of law of contract in this area. The learned Judges, in the course of their reasoning, referred to the decision in *Cooke* v. *Oxley*[1], where a tobacco merchant offered to sell a quantity of tobacco to the plaintiff at a certain price. The plaintiff asked the tobacco merchant for time in which to decide whether he should buy the goods or not. The time for consideration was granted; but before it expired, the tobacco merchant sold the goods to a third party. In a suit for damages by the plaintiff, it was held that the action did not lie, as at the time of entering into the contract the engagement was all on one side. No consideration had passed to bind the seller by his promise to give time and consequently he was entitled to ignore it. In the present case, when the District Forest Officer had taken time to consider whether he should confirm the plaintiff's highest bid, no consideration passed for the contract. Nor did the conditions in the sale notice, by the plaintiff signing the same, bring about a precedent contract between the parties. In fact, there is no such condition in the terms of the sale notice. Even if there was such one, it would be invalid as having no legal force, as pointed out in *Somasundaram Pillai* v. *Provincial Government of Madras*[2]. The position may be different, if, as noticed in *Secretary of State* v. *Baskar Krishnaji*[3], there is a statutory rule having force of law precluding withdrawal of a bid before its acceptance or refusal is communicated to the bidder. The observations in *Agra Bank* v *Hamlin*[4], holding that it was competent for a bidder at a Court auction to withdraw his bid, are relevant in this context. In that case two estates were put up for sale by Court auction on 20th January, 1890, and the plaintiff on whose behalf the bids were made for the two estates, intimated his wish to withdraw the bids to the Nazir on 21st January, and to the Subordinate Judge, on the 22nd January. Muttusami Ayyar, J., observed that, until the lot was knocked down, the Court had a *locus penitentiae* and it followed that, in the absence of some specific provision to the contrary, the bidders were intended to be placed in a similar position. Best, J., said:

> " An offer to buy or sell may be retracted at any time before it is unconditionally and completely accepted, by words or conduct; and a bidding at an auction is mere offer which may be retracted before the hammer is down."

This is not a contingent contract as defined in section 31 of the Contract Act. Nor is the condition as to confirmation a condition subsequent where at that inception itself the duty of the offeree is perfect and obligatory, and only provision is made for latter events to absolve him from performance wholly or in part. It appears to me that, on the facts of this case, there is no legal objection to the bid being withdrawn. Until an offer is accepted unconditionally, it creates no legal right and the bid can be withdrawn at any time.

Learned Counsel for the appellant referred me to the decision of the Supreme Court in *K. P. Chowdhry* v. *State of Madhya Pradesh*[5]. That was a case relating to auction of certain forests by the Divisional Forest Officer. Having regard to the amount of the contract money, the Divisional Forest Officer could not accept the bid and the matter was referred to the Chief Conservator of Forests who had the necessary authority to accept such bid. Before acceptance by the Chief Conservator of Forests, the bidder raised a dispute and resiled from the bid. The contract was re-auctioned and the deficiency was sought to be enforced against him as arrears of land revenue. Thereupon, he had recourse to the proceedings under Article 226 of the Constitution which finally came up before the Supreme Court. In that case, it was admitted that the contract in writing was not signed by the Chief Conservator of Forests, though the appellant had signed the contract forms after he became the successful bidder, as required under the rules. The Supreme Court had to consider the question whether there was a contract between the appellant and

1. (1790) 3 T.R. 653.
2. I.L.R. 1947 Mad. 837: (1947) 1 M.L.J. 123: A.I.R. 1947 Mad. 366.
3. A.I.R. 1926 Bom. 685.
4. (1891) I.L.R. 14 Mad. 235.
5. (1967) 2 S.C.J. 119 : (1966) 3 S.C.R. 919: A.I.R. 1967 S.C. 203.

the Government before the bid at the auction or there was any contract between him and the Government after the auction was over as required by Article 299 (1) of the Constitution. The Full Bench of the Madhya Pradesh High Court held that there was an implied contract which would not hit Article 299 (1) of the Constitution, resulting from the appellant accepting the conditions of the auction sale. The Supreme Court held that, in view of Article 299 (1), there can be no implied contract between the Government and another person, the reason being that if such implied contracts between the Government and another person were allowed, they would in effect make Article 299 (1) useless. The Supreme Court also held that, if the contract between the Government and another person is not in full compliance with Article 299 (1), it would be no contract at all and could not be enforced either by the Government or by the other person as a contract. The fact that the appellant in that case bid at the auction and signed the bid-sheet at the close thereof or signed the declaration forms necessary before he could bid at the auction, it was held, would not amount to a contract between him and the Government satisfying all the conditions of Article 299 (1). It was further held in that case that, in the absence of a contract, recovery of the deficiency could not be made under Madhya Pradesh Land Revenue Code which provided for recovery of all moneys falling due to the State Government under any grant, lease or contract as arrears of land revenue. In the instant case, it is not suggested that, apart from the order of confirmation, there is anything in writing accepting the bid. For an enforceable contract, there must be intent to accept and some external manifestations of it by speech, writing or other act. For complying with the requirements of Article 299 (1) the acceptance of a contract between the Government and a party must be in writing. True, there is no need for execution of any formal document. It is sufficient, as held in *Union of India* v. *A. L. Rallia Ram*[1], if the acceptance in terms of the requirements of the Article is clear from the correspondence between them.

Reference was made by learned Counsel for the Government to the decision of the Supreme Court in *Chatturbhuj Vithaldas* v. *Moreshwar Parashram*[2], and to an unreported decision of this Court in *The State of Madras* v. *Govindaraja Chettiar*[3]. These decisions cannot be of any help to the Government in this case. Decisions to the effect, that even if a contract between the Government and a party is invalid for non-compliance with the requirements of Article 299 (1), it could be ratified by the Government if it was for its benefit, or that section 70 of the Contract Act would enable the party to maintain his claim for compensation if the party performs his part of the contract and the Government receives the benefit of the same cannot advance the case of the respondents here. In the present case, the Government is not seeking to reimburse any benefit it has conferred. This is an action by the plaintiff to recover the earnest money which the Government, in law, cannot retain and for restraining the Government from taking coercive measures against him for recovery of the deficiency. When it is found that there is no valid contract between the plaintiff and the Government the claim for deficiency put forward by the Government cannot stand. Equally the Government cannot claim to retain the earnest money deposited by the plaintiff.

Once it is held that there is no completed contract between the plaintiff and the Government, no further question can arise. Section 66 of the Madras Forest Act enables the Government to recover money due to the Government as if it were arrear of land revenue. Under this section; all money, other than fines, payable to the Government under the Act, or any rule made thereunder or on account of timber or forest produce, or of expenses incurred in the execution of the Act in respect of timber or forest produce, or under any contract relating to timber or forest, including any sum recoverable thereunder for the breach thereof or in consequence of its cancellation or under the terms of a notice relating to the sale of timber or forest produce by auction or by invitation of tenders, issued by or under the autho-

1. (1964) 3 S.C.R. 164: A.I.R. 1963 S.C. 1685. A.I.R. 1954 S.C. 236.
2. (1954) S.C.J. 315: (1952) S.C.R. 817: 3. Appeal No. 377 of 1962.

rity of a District Forest Officer and all compensation awarded to Government under the Act may, if not paid when due, can be so recovered. Here the money claimed by the Government does not fall under any of the heads provided for under section 66. To start with, there is no enforceable contract for a breach to occur. Secondly, my attention has not been drawn to any statutory rule under the Act whereunder the money could be claimed by the Government, the conditions of the auction sale having no statutory force. It is not claimed that any statutory rules having the force of law have been made in this regard. Under section 52 of the Revenue Recovery Act all sums due to the Government, including compensation for any loss or damage sustained by them in consequence of a breach of contract, may be recovered in the same manner as arrears of land revenue under the provisions of the Act, unless recovery thereof has otherwise been specially provided for. To start with, the amount in dispute is not for any loss or damages sustained by the Government in consequence of breach of a contract, as there is no enforceable contract at all between the plaintiff and the Government. The result may be unfortunate that in many cases bidders may withdraw their bids before the official routine is completed. The remedy lies in the hands of the Government. Rules having statutory force could be made to prohibit withdrawal of bids for a reasonable period specified, before acceptance or rejection of the same.

The Second Appeal is allowed with costs throughout. The decree and judgment of the lower appellate Court are set aside and those of the trial Court are restored.

Leave granted.

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

N. Bashyam and another .. *Petitioners**

v.

The State of Madras represented by the District Collector, Tiruchirapalli, and others .. *Respondents*

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961), section 60 and section 3 (34)—'Cultivating tenant's ceiling area'—Person cultivating—If includes association of persons—Ceiling area for two or more persons cultivating land together.

The ceiling of five standard acres prescribed for a cultivating tenant under section 60 of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961, will apply not only to an individual but to an association of individuals. The definition of person in section 3 (34) of the Act itself makes this clear as a person is defined thereunder to include an association of individuals. The definition of person in several statutes like the General Clauses Act, Income Tax Act, Agricultural Income-tax Act, etc., also covers association of persons. An association of persons means persons who have joined in a common purpose or action. There is no formula of universal application as to how many are necessary and in what nature to constitute an association of persons.

Where two brothers have taken land on lease and are both cultivating tenants, the ceiling area for both could only be five standard acres under the Act.

Petition under section 83, Madras Land Reforms (Fixation of Ceilings on Land) Act, 1961 and section 115, Civil Procedure Code, praying the High Court to revise the Order of the Court of the Land Tribunal (Subordinate Judge) Tiruchirapalli at Pudukottai, dated 31st August, 1968 and made in L.T.C.M. A. No. 158 of 1966 (M.R. II.I.B. dated 27th December, 1965 on the file of the Authorised Officer (Land Reforms), Tiruchirapalli.

R. T. Gopalakrishnan, for Petitioners.

The Additional Government Pleader *K. Venkataswami* and *C. Chinnaswamy*, for Respondents.

*C.R.P. No. 2072 of 1968. 7th November, 1969.

The Court delivered the following

JUDGMENT.—This petition, is filed by two persons who took on lease an extent of 12.68 acres, for revising the order of the Land Tribunal (Subordinate Judge), Tiruchirapalli at Pudukottai holding that there was an association of persons and that both the petitioners together are entitled to cultivate only 5 standard acres. The Authorised Officer (Land Reforms), Tiruchirapalli in his proceedings, dated 27th December, 1965 held that both the cultivating tenants could hold only 5 standard acres and that the excess over 5 acres was the surplus available with them. He issued a notice in Form 32 for proceeding with the surplus extent available. The tenants took the matter on appeal to the Land Tribunal (Subordinate Judge), Tiruchirapalli, and the Land Tribunal agreed with the view taken by the Authorised Officer (Land Reforms) and dismissed the appeal. Hence this revision by the cultivating tenants.

Section 60 of the Madras Land Reforms (Fixation of Ceiling on Land) Act 1961 defines 'cultivating tenant's ceiling area' as meaning 5 standard acres held by any person partly as cultivating tenant and partly as owner or wholly as cultivating tenant. Section 3 (10) of the same Act defines 'cultivating tenant' as meaning a person who contributes his own physical labour or that of any member of his family in the cultivation of any land belonging to another, under a tenancy agreement, express or implied, and including any such person, who continues in possession of the land after the determination of the tenancy agreement, and other persons as provided under section 3 (10) (*ii*) of the Act. Section 3 (34) defines 'person' including any trust, company, family, firm, society or association of individuals, whether incorporated or not. Reading section 60 along with sections 3 (10) and 3 (34), the purport of the definition of 'cultivating tenants ceiling area' will have to be determined. Cultivating tenant is defined as meaning a person, and a person under section 3 (34) includes an association of individuals. If the two brothers, who have taken on lease the lands, fall within the scope of the expression "association of individuals,' then they will be treated as having come within the definition of 'person' and both of them together will be falling within the definition of 'cultivating tenant' and the cultivating tenant's ceiling area for a person, that is an association of persons, will be only 5 standard acres. Mr. Champakesa Ayyangar, the learned Counsel for the petitioners, submitted that a cultivating tenant as contemplated in section 60 as well as section 3 (10) would mean only a tenant and if there are more cultivating tenants than one, each one of them will be entitled to the ceiling area of 5 standard acres. He referred to the definition of 'cultivating tenant's ceiling area' itself, which means 5 standard acres held by any person partly as cultivating tenant and partly as owner or wholly as cultivating tenant, and contended that it would indicate that each cultivating tenant would be entitled to hold 5 standard acres and they could not be treated as an association of persons. Section 3 (42) of the General Clauses Act (Central) defines 'person' as including any company or association or body of individuals, whether incorporated or not. Section 3 (22) of the Madras General Clauses Act, 1891, defines 'person' as including any company or association of individuals whether incorporated or not. Section 2 (31) of the Income-tax Act, 1931 defines 'person' as including (*i*) an individual, (*ii*) a Hindu undivided family, (*iii*) a company, (*iv*) a firm, (*v*) an association of persons or a body of individuals, whether incorporated or not, (*vi*) a local authority, and (*vii*) every artificial juridical person, not falling within any of the preceding sub-clauses. Section 2 (*q*) of the Madras Agricultural Income-tax Act, 1955 defines 'person' as meaning any individual or association of individuals, owning or holding property for himself or for any other, or partly for his own benefit and partly for another, etc. Thus it will be seen the expression 'association of individuals' is used in the several enactments referred to above. The Supreme Court has construed the scope of the expression 'association of persons' in three decisions. Dealing with the definition of 'association of persons' occurring in section 3 of the Indian Income-tax Act, in *Income-tax Commissioner* v. *Smt. Indira*[1],

1. (1960) 3 S.C.R. 513 : (1961) 1 S.C.J. 153 : A.I.R. 1960 S.C. 1172.

the Supreme Court quoted with approval the decisions in In re, *B. N. Elias*[1], *Commissioner of Income-tax, Bombay* v. *Laxmidas Devidas*[2], and In re, *D. Warkanath Harishchandra*[3], In In re, *B. N. Elias*[1], Derbyshire, C.J., pointed out that the word 'association' means, according to the Oxford dictionary, " to join common purpose, or to join in an action " In *Commissioner of Income-tax, Bombay* v. *Laxmidas Devidas*[2], the Court pointed out that an association of persons must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one, the object of which is to produce income, profits or gains. The Supreme Court in *I. T. Commissioner* v. *Smt. Indira*[4], summed up the position as follows:

" There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an association of persons within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not."

In *Mohamed Noorullah* v. *Commissioner of Income-tax*[5], the Court reiterated its view expressed in *I. T. Commissioner* v. *Smt. Indira*[4]. Applying the test in *I. T. Commissioner* v. *Smt. Indira*[4], the Supreme Court held that in the case before it the appellants the co-heirs were rightly assessed as an association of persons and that the co-heirs were sharers, who inherited the business carried on by one Khan Sahib Mohamed Oomer Sahib. In *M. M. Ipoh* v. *I. T. Commissioner, Madras*[6], the Supreme Court affirmed the view it expressed in *I. T. Commissioner* v. *Smt. Indira*[4], and held that a minor also will be a member of an association of persons. The test laid down in the case cited was that an association of persons must be one in which two or more persons joint in a common purpose or common action. In this case there can be no doubt that the two Petitioners jointed together for the purpose of taking the property on lease and making profits out of the income from the property. This would, in my opinion, satisfy the test laid down in *I. T. Commissioner* v. *Smt. Indira*[4], the fact that they are brothers will not exclude them from the scope of the definition. It was submitted that the purpose of the legislation will be stultified if both the tenants are treated as association of persons and the limit is fixed at 5 standard acres. It was strenously contended that if any one of the persons had been partly cultivating certain extent of land and partly owning some other extent of land, not only he but other persons will be deprived of the benefit of the Act and the ceiling extent curtailed. There may be some force in this contention but that will not affect the construction to be put on the words 'association of persons'. Following the decisions cited I agree with the view taken by the Courts below and dismiss the petition with costs.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

V. M. Nissar Ahmed and others, Minors by Guardian and next friend V. C. Abdul Munaf Saheb .. *Appellants**

v.

Rahima Bi and others .. *Respondents*

Partnership—Deed of —Construction—Rules of—Attempt to be made to harmonis the several provisions of the instrument—Male heirs of the deceased partner give in the option to join in the partnership and continue in business—Provision for survivorship of the trade mark and goodwill—Contract of partnership, if a partnership at will.

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1. (1935) 3 I.T.R. 408 (Cal.).
2. (1937) 5 I.T.R. 584 (Bom.).
3. (1937) 5 I.T.R. 716
4. (1961) 1 S.C.J. 153 : A.I.R. 1960 S.C. 1172.
5. (1961) 1 An.W.R. (S.C.) 179 : (1961) 1 M.L.J. (S.C.) 179 : (1961) 1 S.C.J. 607 : A.I.R. 1961 S.C. 1043 : 42 I.T.R. 115.
6. (1967) 2 I.T.J. 885 : (1968) 1 M.L.J. (S.C.) 32 : (1968) 1 An.W.R. (S.C.) 32 : (1968) 1 S.C.J. 106 : (1968) 1 S.C.R. 65 : A.I.R. 1968 S.C. 317.

* S.A. Nos. 1168 and 1217 of 1964. 9th January, 1969.

If the contract of partnership, by express provision or by implication, provides for the duration of the partnership, then clearly the partnership is not a partnership at will. Leaving the claims of the second plaintiff to have become a partner on the death of Rasheed, the fifth defendant and the sixth defendant were partners, and they admittedly continued the business. The contract of partnership, while providing for the retirement of one or other of the partners, provided for its being continued without dissolution. On the death of one of the original partners, the contract gave the male heirs of the deceased partner option to join in the partnership firm and continue in the business as partners. The question for consideration is whether such a partnership is a partnership at will?

Held : It is an established rule of construction of a document that the instrument must be read as a whole to ascertain its true meaning. An attempt must be made to harmonise the several provisions of the instrument to find out the true intention of the executants. Every part of the deed must be used to expound every other part of it, so that all the parts of the instrument agree. Reading the document thus, the intention most manifest in the document is, that the goodwill and the trade mark being the most valuable asset of the business, the rest of it being the stock-in-trade, must belong to the partners who remained and carried on the business. Three persons had become partners. Goodwill and trade mark vested in the original partners. The provision is that if one of them is not willing to carry on the business he had to go out of the business receiving Rs. 10,000 for his share of the goodwill and trade mark, and any amounts to his credit in the business. Despite a partner walking out of the business, the business has to be carried on by the remaining two partners. The trade mark and goodwill will be held by the original partner who continues the business. This is during the lifetime of the original partners. The parties intended a sensible business partnership agreement, and it would make nonsense of the several articles of the partnership, if any of the partners could put an end to partnership at his will so long as two of the partners are alive. To make the partnership one at will and give a right to one of the partners, say the sixth defendant, to dissolve it at a moment's notice would be inconsistent with the rights of the remaining partners. The articles of the partnership provide *inter alia* for survivorship of the trade mark and goodwill to the fifth defendant, the third partner in the business. That cannot happen if one of the partners may dissolve the partnership at his will. It follows that the partnership is not one at will determinable by notice at the instance of one of the partners.

Appeals against the decree of the District Court of the North Arcot at Vellore, in Appeal Suit No. 452 of 1961, preferred against the decree of the Court of the Subordinate Judge, Vellore in Original Suit No. 84 of 1958.

V. Tyagarajan and *P. Haridas*, for Appellants.

M. S. Venkatarama Iyer, for Respondents.

The Court delivered the following

JUDGMENT :—These two second appeals arise out of the same partnership action and present a common case against the decision of the Courts below. The principal grievance relates to the trade-mark and goodwill of the partnership business, which it is submitted, are very substantial assets. While the trial Court held that the good will and trade mark of the partnership are assets of the partnership shared by the deceased partner under whom the appellants claim and the other partner, the sixth defendant in the case who died pending the appeal, the appellate Court set aside this finding and declared the sixth defendant to be solely entitled to the trade mark and goodwill of the partnership. Closely connected with the right to the goodwill and trade mark of the firm is the question whether the partnership is a partnership at will, and if there is a dissolution of the partnership what is the date of the dissolution.

First, to set down briefly certain essential facts: One Abdul Rasheed and the sixth defendant in the suit, Abdul Gaffar Saheb carried on in partnership a fairly

successful business in the manufacture and sale of beedies under the name and style of R. Gaffar & Company. The partnership, as an auxiliary venture, had a press under the name and style of Hindustan Press. The partnership between the two is evidenced by the partnership deed Exhibit B-1, dated 14th November, 1940. As the business flourished and the two partners found it difficult to manage the business by themselves, Basheer Ahmed, the fifth defendant in the suit and a son of Abdul Rasheed above referred to, was taken into the business as a partner, and a fresh partnership deed was entered into on 1st April, 1957. That deed is Exhibit B-2 in the case. Abdul Rasheed died on 28th June, 1958. The suit, out of which these second appeals arise, was filed on 1st October, 1958, originally as an action for taking of accounts of a dissolved firm, on the basis that the firm stood dissolved on the death of Abdul Rasheed. The first plaintiff in the suit is one of the widows of the deceased Abdul Rasheed. The second and third plaintiffs in the suit are his sons. Both were minors at the time of the institution of the suit. Pending the suit, on 27th July, 1959 the second plaintiff attained majority and he was declared a major in 1960. The first defendant is another widow of the deceased Abdul Rasheed. Besides the fifth defendant who had been taken into the partnership, the deceased had two other sons by her, the second and third defendants in the suit. They are all minors. The fourth defendant is a minor daughter of the deceased. The sixth defendant in the suit is the other partner. He died pending the appeal which he preferred to the lower appellate Court, and his widow and children were brought on record as his legal representatives by the lower appellate Court on 23rd August, 1962. The plaintiffs were originally unaware of the subsequent partnership agreement. Exhibit B-2 and, on its being set up in defence, the plaint was amended in terms of the latter partnership agreement. The plaintiffs gave up the case of dissolution of the partnership by the death of Abdul Rasheed and on the basis of the second partnership deed, they prayed for taking of accounts of the partnership business, ascertaining the amounts due to each of the plaintiffs, declaring that the second plaintiff is a partner and the third plaintiff is entitled to be admitted to the benefits of the partnership and for directions to implement the rights of the parties in terms of the latter partnership agreement and also for other incidental reliefs.

The plaintiffs contended that there was no dissolution of the firm on the death of Abdul Rasheed and prayed for reliefs on the basis that the pertnership continued notwithstanding the death of one of the partners. It is the case of the sixth defendant also that there was no dissolution of the partnership with the death of Rasheed and, the fifth defendant, to the extent his interests were not jeopardised, made common cause with the sixth defendant. Having regard to the claims put forward by the plaintiffs based on Exhibit B-2, the sixth defendant, by his additional written statement, prayed that the partnership may be dissolved and that his written statement may be taken as notice for the dissolution of the partnership. The Subordinate Judge, who tried the suit, held that there was no dissolution of the partnership on the death of Rasheed. Having regard to the partnership agreement, Exhibit B-2, he held that the male descendants of Abdul Rasheed are entitled to rights in terms of the deed immediately on the death of their father and that the plaintiffs 2 and 3 and defendants 2 and 3 are entitled to be admitted to the benefits of the partnership from the date of their father's death. He also found that the second plaintiff who became a major in 1959 became a full partner of the firm. He, however, held that the partnership must be deemed to be dissolved on 16th September, 1960, the date on which the sixth defendant filed his additional written statement giving notice of dissolution. Though the sixth defendant who preferred the appeal against the decree of the Subordinate Judge raised a number of points, on his death, his legal representatives confined their contentions to the exclusive claim of the sixth defendant for the trade mark and goodwill of the firm. Plaintiffs 2 and 3 and defendants 2 to 4 who preferred cross-objections questioned the finding about the dissolution of the firm and asserted the right of the second plaintiff to continue the firm. In the appeal, a question was also raised whether the fifth defendant, one of the partners, is not solely entitled to the trade mark and goodwill of the firm to the exclusion of the co-heirs and heirs of the sixth defendant. As already stated, in the appeal,

the heirs of the sixth defendant succeeded in establishing the exclusive right of the sixth defendant to the trade mark and goodwill of the firm. The appellate Court in other respects confirmed the finding of the trial Court holding that the firm stood dissolved on 16th September, 1960 when the sixth defendant filed his additional written statement claiming dissolution.

As in the appeal, in the second appeals also, the contentions were mainly confined to the claims in regard to the trade mark and goodwill of the firm and the date of dissolution of the partnership as the former was dependent on that. The principal contentions of the appellants are (1) that the partnership is not a partnership at will for the sixth defendant to get it dissolved by notice of dissolution; (2) that even if it is a partnership at will, by a mere claim for dissolution in the written statement, there can be no dissolution and (3) that the sixth defendant has no exclusive right to the trade mark and goodwill of the firm and, as they are partnership assets they have to be considered and dealt with as such. Even so the fifth defendant has no exclusive right in the same. Another point was also raised that the second plaintiff on attaining majority could continue the partnership.

The whole case rests upon the true interpretation of the partnership deed Exhibit B-2. Though it is not a lengthy document, the provisions therein are complexly set out and have given room for all the controversies. In the partnership deed entered into between Abdul Rasheed and Gaffar in 1940 they provided that, so far as the goodwill and trade make were concerned, the survivor of the two would be solely entitled to it, and that the heirs and representatives of the other would have no rights whatsoever in the same. Of course, there was provision for division of the profits etc. half and half. Under Exhibit B-2 with the coming in of the fifth defendant as a partner, the same idea that whoever continued the firm should have rights in the trade mark and goodwill is maintained, re ognising, at the same time, the paramount rights of the two original partners to the trade mark and goodwill. Under this document, Gaffar and Rasheed are each given two out of the five shares and the fifth defendant the new partner is given the remaining one-fifth share. Clauses 5, 6 and 7 of Exhibit B-2 are the relevant clauses and on their correct interpretation depends the answer to the question whether the partnership is a partnership at will or not and the other question as to who is entitled to the rights in the trade mark and goodwill of the firm. I have read and re-read the document in the vernacular. It would be convenient if a free translation of the material clauses are set out. The sixth defendant is the No. 1 party to the document Rasheed is No. 2 party to the document and the fifth defendant is the No. 3 party to the document. The clauses run;

Clause 5:—"If during the lifetime of parties Nos. 1 and 2, whoever of them wants to get out of the partnership, he shall give notice not exceeding three months in writing to the other partners. The trade mark and good will of the partnership shall be valued at Rs. 20,000 and the out-going partner shall receive one half of the said amount, *i.e.*, Rs. 10,000, and the amounts standing to his credit in the partnership and retire from the partnership. The trade mark and goodwill shall thereafter belong to the partner continuing the business of the firm. But, after the lifetime of Nos. 1 and 2, the male heirs of No. 2 party shall remain in the business and continue it. If they are not willing to continue in the business, the trade mark and goodwill shall be estimated then at the sum of Rs. 20,000 and one half of the amount, *i.e.*, Rs. 10,000 and the amounts standing to their credit in the firm shall be paid over to them. (The third party to the dcoument will also be entitled to a share when payments are made as aforesaid). Thereafter, the trade and goodwill etc. all shall belong exclusively to No. 3 party continuing the business. The male heirs of No. 1 also shall join the firm and run the business. If they are not willing to so carry on, when they walk out, they need not be paid the sum of Rs. 10,000 being the value of trade mark and goodwill. Instead, in consideration, they shall be given the Hindustan Press etc., as provided hereunder."

Clause 6 " The beedi business and the Hindustan Press belong to the firm called R. Gaffar and Company. The trade mark and goodwill belonging to

the said company shall, during the lifetime of No. 1 and No. 2, belong to them. No. 3 has no rights therein. If, after the lifetime of Nos. 1 and 2, this business is continuously carried on by No. 3, then the trade mark and goodwill of the company shall belong to No. 3. Others have no rights in them."

Clause 7:—" If anyone of Nos. 1 and 2 should die, the accounts of the firm shall be taken and closed till that date, the profit or loss shall be determined after providing for all expenses, staff salary etc., and the same along with the amounts standing to the credit of the deceased in capital (in the books of the firm) shall be given to the respective persons. The male heirs of the deceased shall be in the firm and carry on the business and the amounts found due to them for their share as aforesaid they shall retain in the business and carry on the business. If the male heirs of No. 1 do not consent to remain in the partnership and carry on the business, then the Hindustan Press with its name and the related machinery, types etc. with all accessories shall be handed over to them free of cost without valuation. But as the premises belong to No. 2, the business may be carried on there on payment of rent according to the times."

One thing is manifest, on a reading of this document. The desire of the two partners who started on their own in 1940 and developed the business and made it a flourishing one, was that the business should be continued. Obviously, with a view to this, the fifth defendant who had already been trained in the trade, was taken in as a partner in 1957. The document provides for the fifth defendant continuing the business after the lifetime of Nos. 1 and 2. This is very prominently brought out in clause 5 of the deed. While the fifth defendant, who had got himself duly qualified as set out in the preamble, is to continue the business after the death of Nos. 1 and 2, an option is provided to the other male heirs of his father Rasheed to join and continue in the business. If they are not willing to do so, they take their share in the assets of the firm according to the personal law, the fifth defendant also being a sharer with them in the assets of the father. The trade mark and goodwill, the main stay of the business, have to go with the business and belong to the fifth defendant who carries on the business. A sum of Rs. 10,000, the value of the half share, is distributed among the heirs. Clause 5 itself provides for the heirs of the first party, the sixth defendant, in a similar manner joining the partnership and continuing the business. If they evince no desire to remain in the firm and continue the business instead of giving them a sum of Rs. 10,000 for the trade mark and goodwill, they are to be given the auxiliary business, the Hindustan Press. Clause 7, as I read it, only elaborates what is already set out in clause 5. It sets out when and in what manner the Hindustan Press shall go to the male heirs of the first party. The deed shows in both Nos. 1 and 2, a paramount desire that their male heirs continue the business in partnership. But they provide against the contingency of the heirs not choosing to continue in the business. The Courts below correctly held the there was no dissolution of the firm on the death of Rasheed. There is a clear indication in the deed that the male heirs of the deceased partner should join in the firm that would be continued by the remaining partners, the amounts payable to them being credited to their account in the firm. In fact, on this, there was no contest. It is the common case of the parties that the partnership was continued without any dissolution on the death of Rasheed.

The more difficult question is whether this is a partnership which can be dissolved by notice under section 43 (1) of the Indian Partnership Act as a 'Partnership at will.' It is only if the partnership is a partnership at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. On such notice, the firm is dissolved from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned, from the date of communication of the notice.

The contention for the appellant is that this is not a partnership at will. Section 7 defines 'partnership at will' as a partnership where no provision is made by contract between the partners for the duration of their partnership or for the determination of their partnership. If the contract of partnership, by express provision or by

ship is not a partnership at will. Leaving out the claims of the second plaintiff to have become a partner on the death of Rasheed, the fifth defendant and the sixth defendant were partners, and they admittedly continued the business. The contract of partnership, while providing for the retirement of one or other of the partners, provided for its being continued without dissolution. On the death of one of the original partners, the contract gave the male heirs of the deceased partner option to join in the partnership firm and continue in the business as partners. The question for consideration is whether such a partnership is a partnership at will? Whether the parties to the contract of partnership could have intended, while providing in specific terms for the continuance of the partnership business and the maintenance of the goodwill in the firm despite retirement or death of a partner, that any one of the partners can at any moment by notice to others dissolve the firm? Is such an inference compatible with the expressed terms of the contract?

In Halsbury's Laws of England, Third Edition, Vol. 28 at page 502, while pointing out that, where there is no express agreement to continue a partnership for a definite period, there may be an implied agreement to do so and that the burden of proving such an implied agreement is upon the person who alleges its existence, it is observed that the provisions relied on as showing an agreement to continue the partnership 'must be clearly inconsistent with the general right to dissolve.' In *Karumuthu Thiagarajan Chettiar* v. *E. M. Muthappa Chettiar*[1], the Supreme Court observed at page 1229:

> "As we read the terms of the agreement, it seems to us clear that the intention could not be to create a partnership at will. The partners contemplated that the management would be carried on in rotation between them in four yearly periods. It was also contemplated that the heirs of the partners would also carry on the management in rotation. Considering this provision as well as the nature of the business of partnership it could not be contemplated that the partnership could be brought to an end by notice by either partner. The intention obviously was to have a partnership of some duration though the duration was not expressly fixed in the agreement..........The duration of a partnership may be expressly provided for in the contract; but even where there is no express provision, Courts have held that the partnership will not be at will if the duration can be implied."

Considering the question whether a term in the contract of partnership permitting a partner to withdraw from the partnership by relinquishing his right of management to the other partner would make it a partnership at will, the Supreme Court observed.

> "That however does not make the partnership a partnership at will, for the essence of a partnership at will is that it is open to either partner to dissolve the partnership by giving notice. Relinquishment of one partner's interest in favour of the other, which is provided in this contract, is a very different matter. It is true that in this particular case there were only two partners and the partnership will come to an end as soon as one partner relinquishes his right in favour of the other. That however is a fortuitous circumstance..........."

Their Lordships cited with approval the decision in *Abbott* v. *Abbott*[2], which I shall be presently referring to.

In Lindley on Partnership (Twelfth edition) at page 159, it is said that an agreement which will rebut the presumption that a contract of partnership is a partnership at will

> "may be established as well by direct evidence as by implication from the acts of partners and it is not possible to lay down any rule by means of which the intention of the partners on this head may be certainly ascertained where no express agreement has been come to."

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1 (1962) 1 S.C.J. 31 : (1962) 1 M.L.J. (S.C.) 19 : (1962) 1 An.W.R. (S.C.) 19 : A.I.R. 1961 S.C. 1225.
2. (1936) 3 All E.R. 823.

Where a contract of partnership is by deed, clearly the intention should be found within the four corners of the instrument. In *Abbott* v. *Abbott*[1], the deed of partnership between a father and his five sons provided that death or retirement of any partner shall not terminate the partnership. On one of the sons contending that the partnership had been dissolved on notice of dissolution, the question was whether an inference could be made by necessary implication that it was not a partnership at will. Clauson, J., posed before himself the question: " Whether the parties have agreed that any one of the sons, or the father, can bring the business to an end at any moment or whether there is some agreement inconsistent with that being done? " For the conclusion that the partnership considered was not one at will, one of the tests the learned Judge applied was that if one partner said that he would go out of the partnership, it did not determine the partnership. If the partnership is one at will, then if one partner said that he would go out of the partnership, the effect would be to dissolve the partnership between all the partners. That partnership would come to an end, although the remaining partners may regroup themselves into a partnership. That would be a different partnership. The existence of a limitation upon this character of partnership was emphasised by the learned Judge as a test. An agreement between the partners that a single partner cannot determine the partnership between all although he can determine it as between himself and others was considered as negativing the partnership at will. The learned Judge observed:

> " The partners have agreed that the partnership shall continue, notwithstanding that one partner goes out, and they have also agreed that notwithstanding that one partner died, the partnership shall continue. That does not mean that the partnership shall continue when all but one of the partners has either died or retired, because there cannot be a partnership with one partner. But the clause seems consistent with the view that so long as there are two partners the partnership is to continue."

I shall now examine Exhibit B-2 in the light of these principles. The document itself sets out the circumstances in which the latter agreement of partnership was entered into. The former agreement of partnership which was between the two original partners provided that if one of them went out of the business, the trade mark and goodwill would be with the remaining partner who carried on the business. It is an established rule of construction of a document that the instrument must be read as a whole to ascertain its true meaning. An attempt must be made to harmonise the several provisions of the instrument to find out the true intention of the executants. Every part of the deed must be used to expound every other part of it, so that all the parts of the instrument agree. Reading the document thus, the intention most manifest in the document is, that the goodwill and trade mark being the most valuable asset of the business, the rest of it being the stock-in-trade, must belong to the partners who remained and carried on the business. Three persons had become partners. Goodwill and trade mark vested in the original partners. The provision is that if one of them is not willing to carry on the business, he had to go out of the business receiving Rs. 10,000 for his half share of the goodwill and trade mark, and any amounts to his credit in the business. Despite a partner walking out of the business, the business has to be carried on by the remaining two partners. The trade mark and goodwill will be held by the original partner who continues the business. This is during the lifetime of the original partners. As to the character of the partnership during that period, the test applied in *Abbott* v. *Abbott*[1], is clearly satisfied. It certainly could not have been the intention of the parties that during the lifetime of the two original partners" (one) could, instead of retiring from the partnership taking his share, by notice, dissolve the partnership between all the three partners. Admittedly on the death of Rasheed, the partnership was not dissolved but has been continued by the fifth and sixth defendants. There can be and there is no change in the character of the partnership thereafter. The contract of partnership contemplates the male heirs of the original partners joining

1. (1936) 3 All E.R. 823.

the partnership and continuing the business. No doubt the option is with them. The surviving partners, the fifth and the sixth defendants are not left with any option to keep them out. If the male heirs do not desire to join in the partnership, they have to be paid what they are entitled to under the personal law from the assets of the deceased partner. The trade mark and goodwill do not go out of the firm. They remain with the surviving of the original partners continuing in the firm and after him with the fifth defendant. While it is unnecessary, having regard to the events that had happened in this case as will be pointed out presently, to discuss the question whether the male heirs of a deceased partner could specifically enforce the covenant in the partnership deed providing for their being taken in as partners when they were all minors at the crucial time, the provision in this regard is a factor to be taken into consideration in determining whether the partnership is terminable at will. It is a fortuitous circumstance that none of the other sons of Rasheed was a major when he died. The articles in this regard do not bind the male heir and it is for him to determine whether he will get into the partnership or not. But it is evident that the parties to the deed of partnership intended the continuance of the partnership at least till its determination by the death of all but one of the partners. There are certain other aspects relating to the ownership of the trade mark and goodwill which emphasise the fact that when the partnership was formed under Exhibit B-2, the parties never intended its termination and dissolution amongst all the partners at the will of one of the partners. The parties intended a sensible business partnership agreement and, in my opinion, it would make nonsense of the several articles of the partnership, if any of the partners could put an end to partnership at his will so long as two of the partners are alive.

Mr. M. S. Venkatarama Ayyar for the respondents referred to the decision of this Court in *Sami Aiyangar* v. *Srinivasa Aiyangar*[1], where it was held that a partnership deed which did not fix the duration of the partnership but only provided that after the death of one of the partners his nephew should act in his stead was a partnership at will only. The decision turned on the provisions of the partnership deed in consideration there, and it was pointed out that the only provision relied upon was not inconsistent with a partnership at will. The decision in *Cox* v. *Willoughby*[2], referred to and distinguished therein is more to the point and supports the case of the appellants here. Equally, the other case, *Cuffe* v. *Murtagh*[3], relied on before me by learned Counsel for the respondents is clearly distinguishable. In that case, it is observed at page 422,

> "The disputed term here is not........nor is it inconsistent with any of the rights of the other partners, if by tacit agreement they should continue the business after the expiration of the term of seven years. I can see nothing insensible or repugnant in such a clause if inserted in a deed establishing a partnership at will. It amounts to this and no more, that one partner may put a substitute for himself into the firm, who will have just the same rights as he would have had if he had continued a partner. If he was but a partner at will, so would his substitute be; if a partner for the residue of a term, so would his substitute be."

But in the case here, under consideration, to make the partnership one at will and give a right to one of the partners, say the sixth defendant, to dissolve it at a moment's notice would be inconsistent with the rights of the remaining partners. The articles of the partnership provide *inter alia* for survivorship of the trade mark and goodwill to the fifth defendant, the third partner in the business. That cannot happen if one of the partners may dissolve the partnership at his will. It follows that the partnership is not one at will determinable by notice at the instance of one of the partners.

Learned Counsel for the appellants contends that, even if the partnership could be deemed to be one determinable at will, there has been no proper notice in terms of section 43 of the Partnership Act for bringing about the dissolution of the firm. Counsel in this connection referred me to the decision of the Supreme Court in *Banarsi Das* v. *Kanshi Ram*[4], There are observations in the Judgment in

1. (1909) 19 M.L.J. 77.
2. (18880) 13 Ch. D. 863.
3. 7 Ir.L.R. 411.
4. (1964) 1 S.C.R. 316 : A.I.R. 1963 S.C. 1165

support of the contention that the mere filing of suit for dissolution of a partnership at will does not amount to notice of dissolution of the partnership. Mr. M. S. Venkatarama Ayyar, learned Counsel for the contesting respondents, points out that in that case the Court was principally concerned with the date on which the partnership should be deemed to have been dissolved and that the observations therein are in relation to the particular facts of the case. Learned Counsel contended that there are a catena of decisions, English and Indian, for the proposition that the filing of suit followed by service of summons in the suit on the other partners would have the effect of the requisite notice for dissolution of a partnership at will the dissolution dating from the service of summons on all the partners. It is urged that written statement and pleas in answer to a bill in chancery in England have been held to constitute valid notice. Counsel refers to section 32 (*c*) of the United Kingdom Partnership Act, 1890, where also written notice of intention to dissolve is contemplated. Reference was made to the decision of the Judicial Committee in *Sathappa Chetty* v. *Subramanyan Chetty*[1] and certain other cases prior to the Indian Partnership Act of 1932. They may be distinguished as there was no provision as to notice in the repealed chapter of the Contract Act relating to partnership law. *Sailendra Nath Kumar* v. *Chillar Ram*[2], a case subsequent to the Indian Partnership Act of 1932 was also cited. *Inter alia*, my attention was drawn to foot note (*g*) at page 562 of Halsbury's Laws of England, Third Edition, Vol. 28; *Unsworth* v. *Jordan*[3], *Syers* v. *Syers*[4] Lindley on Partnership, 12th Edition, page 597 bottom; passages from Rowley on Partnership (American) and also Corpus Juris Secundum, Vol. 68, paragraph 333 at pages 845-846. With reference to the passage at page 929 in Corpus Juris Secundum, referred to in the Supreme Court decision above referred to, it is pointed out that all that is said there is that the mere institution of suit for dissolution and accounting does not *ipso facto* dissolve the partnership. The point in the case before the Supreme Court was one of limitation and the question was whether the partnership was dissolved on the date of presentation of the plaint in an earlier suit for dissolution between the partners, which had ended with a dismissal for default, or any later date. The Supreme Court pointed out that for fixing the date of dissolution, the plaint in a suit for dissolution cannot be taken as 'notice' under sub section (2) of section 43 of the Indian Partnership Act, having regard to the requirements of notice. The Supreme Court observed:

> "It would follow therefore that the date of service of the summons accompanied by a copy of the plaint in the suit for dissolution of partnership cannot be regarded as the date of dissolution of the partnership and section 43 is of no assistance."

The emphasis in that case, learned Counsel submitted, was on the requirement as to due service of notice of dissolution on the other partners and fixing the date of dissolution. The instant case, being a case of written statement in which it is specifically mentioned that it may be taken as notice of dissolution, it is submitted, made all the difference and could effectively bring about dissolution of the partnership. Having regard to the specific averments in the written statement of the desire for dissolution and that the written statement itself might be taken as notice for dissolution, I see that there may be no impediment to distinguish the instant case from the case before the Supreme Court. The essential for a valid notice under section 43 (1) of the Indian Partnership Act, a firm and final intention to dissolve the partnership, is there. And the written statement is required to be treated as notice of that. No particular form or mode of service is prescribed for the notice. The date of dissolution would be the date of service of the written statement on the other partners and the written statement may in the circumstances well be treated as notice under section 43 (2) of the Act. However, I do not think it necessary, in the view I take of the character of the partnership here, to express any final opinion on this aspect of the case. Though the partnership is not dissoluble at will, I heard no particular arguments from Counsel for the continuance of the partnership, may be, having regard to the subsequent events. Counsel for the appellants concentrated

1. (1927) 53 M.L.J. 245: A.I.R. 1927 P.C. 70.
2. I.L.R. (1951) 2 Cal. 140.
3. 1896 W.N. 2.
4. L.R. (1876) 1 A.C. 174.

his attack on the dissolution of the partnership at the will of the sixth defendant and his exclusive claim to the goodwill and trade mark based thereon, while Counsel for the respondents would press on the dissolution of the partnership at the will of the sixth defendant in an effort to sustain exclusive title for the sixth defendant to the goodwill and trade mark of the firm. Section 44 (*g*) of the Indian Partnership Act of 1932 provides for the Court, at the suit of a partner, to dissolve a firm on any ground which renders it just and equitable that the firm should be dissolved. The words 'just and equitable' are wide in their amplitude and enable the Court to take into consideration events subsequent to the date of the suit and factors apparent on the record on such events. Though the suit as it emerged finally after amendment is not one for dissolution but for the continuance of the partnership, originally it was instituted for accounts of a dissolved firm. The sixth defendant, by his written statement, while denying the rights of the plaintiffs to join and continue the firm, by his supplemental written statement gave notice of dissolution of the firm. The fifth defendant, the other partner, joined with him to the extent the claims of the sixth defendant were not against his interests. When the trial Court decreed that the partnership stood dissolved from 16th September, 1960, while the sixth defendant appealed against the decree to the extent, his claims to the trade mark and goodwill were denied, there was no appeal or Memorandum of Cross-objections by the fifth defendant. Cross-objections were preferred only by defendants 2 to 4 and plaintiffs 2 and 3 questioning the decree declaring dissolution of the firm. In this Court also, the fifth defendant has not figured as an appellant. A point, no doubt, was framed in the lower appellate Court about the exclusive right of the fifth defendant to the trade mark and goodwill of the firm. The sixth defendant died pending the appeal in the lower appellate Court. Defendants 2 to 4, the appellants in S.A. No. 1168 of 1964, are still minors, and the second appellant in S.A. No. 1217 of 1964 became a major pending the appeal here and the second plaintiff became a major only pending suit. The learned District Judge points out in the judgment that the fifth defendant is not now conducting the business and the stock-in-trade had all been sold away by the Commissioner appointed in the suit. It is remarked by the learned District Judge that there is no evidence to show that the fifth defendant, the third partner of the firm, had been continuing the business after the lifetime of Gaffar, the sixth defendant. Having regard to the circumstances, the substantial dispute relating to only the rights in the goodwill and trade mark of the firm, I think it is a case where the Court must declare the partnership as dissolved. At the time the suit was instituted, clearly the plaintiffs cannot claim to be, even then partners. They were all minors at the time of the institution of the suit, and could, if at all, claim to be admitted to be benefits of the partnership. Minors, thus admitted to the benefits of partnership, do not have all the rights of partners and their rights in this regard are inchoate. On the date of the suit, only the fifth and sixth defendants were partners in the full sense of the term, and the sixth defendant died pending the appeal. The claim of the second plaintiff who had become a major pending the suit to be a partner has been disputed. A partnership suit is like a partition suit where either side may claim dissolution, in the alternative to any other pleas he may raise. See *Shibram* v. *Chintohar*[1]. The sixth defendant in his written statement has claimed dissolution. No business, has been carried on, at any rate, after the second plaintiff became a major, and assuming without deciding that he has become a full-fledged partner, it is not said that any of the parties are likely to be prejudiced by not directing the continuance of the partnership and enforcing the rights of the male heirs to join in the business, if that could be done. All the more so, in the view I am taking as to the rights in the goodwill and trade mark of the firm. Under the articles of the partnership, the male heirs of the sixth defendant could elect to continue the business, and, if they should exercise their option and not join the business, they should be given the Hindustan Press. On the death of the sixth defendant pending the appeal, they came on record as legal representatives and have continued the appeal pressing the claim put forward by him of dissolution of the partnership. In the circumstances, on his death, they have not

1. A.I.R. 1933 Lah. 1032.

exercised the option to join in the business and continue the partnership. This suit relating to the partner-ship has been pending since 1958. Circumstances are such that it would be just and equitable to dissolve the partnership, even if it should be held that the partnership was not dissolved on the death of the sixth defendant leaving only the fifth defendant as a partner, and the second plaintiff had also become a partner. The male heirs and other heirs would be having their rightful shares in the assets of the partnership with any profits that may have accrued. A decree for dissolution of the partnership as provided by the Court below, but dating from the date of death of the sixth defendant is the practical and proper solution of this tangled state of affairs. As matters stand it does not appear reasonably practicable to attain the object which the three partners had in mind when they entered into the contract of partnership.

The next and really important question is as to the rights in the trade mark and goodwill of the firm. The learned Subordinate Judge held that the goodwill is an asset of the partnership and has to be dealt with accordingly and sold under section 55 of the partnership Act. He found against the claim of the fifth defendant as he would be entitled to the goodwill only if he had continued the business after the death of Rasheed and the sixth defendant. The learned District Judge has held that it belongs solely to the sixth defendant. The rights to goodwill have to be found under the terms of the deed of partnership Exhibit B-2. The partners when they entered into the agreement of partnership, Exhibit B-2, attached the greatest importance to the trade mark and goodwill of the firm. Having regard to the nature of the trade, it is the goodwill that brought in the profits and the maintenance of the goodwill was considered so essential to the development and successfull carrying on of the business that they never contemplated the goodwill to be separated from the business. It has been continued in one or the other of the partners in the business who carried on the same. During the life time of Rasheed and the sixth defendant, it had been owned by them jointly. If either of them went out, he was paid Rs. 10,000 for his share in the goodwill and trade mark of the firm. The fifth defendant, the third partner, if he should survive the other two partners and continued the business, took the goodwill and trade mark for himself. Quite properly, in the circumstances, the trial Court, when on this part of the case, observed:

> " Clause 6 provides for a contingency of keeping the goodwill in tact in the absence of any dissolution of the partnership. It does not provide for the disposal of goodwill after the dissolution of the partnership because Exhibit B-2 does not at all contemplate any dissolution."

In Lindley on Partnership (12th Edition) at page 467, with reference to goodwill, it is pointed out that goodwill is generally used to denote benefit arising from reputation and that goodwill has no meaning except in connection with a continuing business. At page 471 of the treatise, it is found that 'if the firm is dissolved, and there is no agreement to the contrary, the goodwill must be sold for the benefit of the partners, if any of them insisted upon such a sale.' The treatise points out that partnership trade mark is another important element in the goodwill of the business and such marks are assets of the firm saleable on dissolution like any other asset. Of course, the rights would be dependent on any contract to the contrary in the articles of the partnership.

Now to take up the claim of the sixth defendant to the exclusive right to the goodwill and trade mark, clause 6 no doubt vests in Rasheed and Gaffar (sixth defendant) the rights in the goodwill and trade mark of the firm. But the vesting of the rights in them is for their life-time only. Of course, if any of them went out of the partnership, he should be paid Rs. 10,000 which is the estimated value of the goodwill and trade mark. On the death of either of them, their heirs do not get the trade mark and goodwill. The trade mark and goodwill are retained in the business, and they are credited to heirs of Rasheed with a sum of Rs. 10,000 being the value of half share of the deceased. Gaffar's heirs get the Press. During their lifetime the trade mark and goodwill remain with the business as an asset of the firm belonging to them only. On their death they devolve on the fifth defendant. During

their lifetime, though a partner, in the business, the fifth defendant had no ownership in the goodwill and trade mark. So far as the sixth defendant is concerned, I have already held that there was no dissolution of the firm during his lifetime. That apart, as pointed out by the trial Court, the dissolution of the firm by the surviving of the two original partners is not contemplated at all in the partnership deed Exhibit B-2. If he retired from the firm, the provision in clause 5 is that the retiring partner should be paid Rs. 10,000 as and for his share of the rights in the trade mark and goodwill and nothing more. On my finding that the firm has not been dissolved as a partnership at will at the instance of the sixth defendant, all that can be said is that the sixth defendant continued to be the owner of the goodwill and trade mark of the firm till his death. On his death, if the business had been continued by the fifth defendant the third partner, it would have devolved on him. On the terms of the agreement of partnership, the goodwill and trade mark are not the assets of the sixth defendant transmissible to his hairs in specie. There is no provision as to what should happen with reference to goodwill and trade mark of the firm, in the event of the partnership not continuing after the death of Rasheed and Gaffar. Such a contingency has not been contemplated. The fifth defendant, as found by the Courts below, cannot, in the circumstances, claim any exclusive rights to the goodwill and trade mark. In the absence of any provision in this regard, goodwill and trade mark must be deemed to be in the assets of the firm belonging to or contributed by Rasheed and Gaffar and to be dealt with as such. As the fifth defendant in also an heir of Rasheed, it is immaterial how the matter is viewed. In no event can the fifth defendant claim exclusive rights therein. In fact, as pointed out earlier, he has preferred no appeal claiming exclusive rights to the same; nor was nay argument advanced before me on his behalf.

It follows that the decree of the lower appellate Court deleting clause (10) of the decree of the trial Court has to be set aside, and clause (10) of the decree of the trial Court restored. This, in fact, is the substantial variation made by the lower appellate Court in the decree of the trial Court. The decree of the trial Court has further to be varied in regard to the date on which the partnership should be dissolved. The partnership should be held to have become dissolved as and from the date of death of Gaffar, the sixth defendant in the suit, and not earlier.

The second appeals are allowed to the extent above indicated. The parties will be entitled to half costs in each appeal from the contesting respondents. Leave granted.

V.M.K. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Thiruvavaduthurai Adheenam by its Adheenakarthar Sri La Sri Subramania Pandara Sannadhi Avergal (died)

His Holiness Sri La Sri Ambalavana Pandara Sannadhi Avergal present Adheenakartha Thiruvavaduthurai Adheenam, Thiruvavaduthurai .. *Petitioner**

v.

State of Madras by the Secretary to Government, Revenue Department, *Fort St. George*, Madras and others .. *Respondents.*

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1963)—*Enfranchised inam—Title deed issued by the Government to the inamdar—Jurisdiction to notify under the provision of the Act.*

After considering the Inam Commission proceedings it was held that it is meaningless to say that an inam land in respct of which a title deed is issued to the inamdar will continue to be an inam land.

*W.P. No. 2319 of 1966. 18th August, 1969.

While under clause 3 of the title deed, if the title holder agrees to pay an annual quit rent his inam tenure will be converted into a permanent freehold, in which case the land will be his own absolute property to hold or dispose of the same as he thinks proper, under clause 4 if he wants to commute the quit-rent by payment of a sum of money once for all, equal to twenty years of purchase of the quit-rent, we would be at liberty to do so. An inam enfranchised by the payment, of annual quit-rent or of a single fixed sum equal to 20 years purchase of the quit-rent becomes the absolute property of the title holder. The only difference between the two is that in the latter case there is no liability for annual payment of quit-rent. This right has been specifically conferred on enfranchised inamdars as a result of the inam commission's proceedings and it is a right which no ryotwari pattadar has but that does not change the character of the tenure.

Held on facts, the commutation or failure to commute under clause 4 does not make any difference in this case to the character of the tenure. The Government have no jurisdiction to notify this village under the provisions of Act XXVI of 1963, as it no longer retains character as inam.

Petition under Article 226 of the Constitution of India, praying that in the circumstance stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the notification G.O.Ms. No. 2620, Revenue, dated 18th August, 1966, published in the *Fort St. George Gazette*, Part II, section 1 dated 24th Augst, 1966, at page, 1331 and quash the same in so far as it relates to the village Kodarankulam, in Ambasudram Taluk, Tirunelveli District.

M. Ranganatha Sastri and *S. Gopalan*, for Petitioner.

U. Somasundaram, for Responents Nos. 2 to 6.

The Government Pleader *K.S. Bakthavatsalam*, and the Assistant Government Pleader, for 1st Respondent.

The Court made the following

ORDER.—The petitioner is Thiruvavaduthurai Adheenam. The petition relates to a notification issued by the Government under Madras Act XXVI of 1963, fixing the 1st day of October, 1966 as the appointed day on which the provisions of that Act would take effect in relation to the village of Kodarankulam. The petitioner states that the lands were originally leased by the Nawab of Carnatic to one Ragho Pandit, that later the lease was converted into Kattukuthagai, that on the assumption of power by the British Government full assessment was charged annually, and that finally during the Inam settlement the inam tenure was converted into a permanent freehold and title deed 204 dated 10th September, 1864 was issued by the Government. The petitioner's contention is that the inam which has been enfranchised stands on the same footing as ryotwari land, and that the provisions of Madras Act XXVI could not be applied to the village. The contention on behalf of the Government, however, is that the term "freehold" in relation to inam is only the conferment of the right of alienation free from the restrictions, that the inam character itself was not abolished, that the word "freehold" in inam was used in two different senses, (1) a freehold in perpetuity subject to the payment of quit rent and (2) absolute freehold free of all tax whatever was due to the Government, that this is not a case of permanent freehold, that if there was no inam tenure, the title deed would not have been issued under the rules framed in the Sttlement of Inams, and that the contention of the petitioner that the village is not at all an inam is not maintainable.

But for the strange arguments advanced in this case, I would not have considered that this matter lends itself to any argument whatsoever in answer to the contentions on behalf of the petitioner. The arguments ignore the whole course of inam proceedings, the purpose for which the Inam Commission was set up and the result of the activities of the Inam Commission. In the Collection of papers relating to the Inam Settlement in the Madras Presidency, Volume 1, published by the Madras Government in 1948, at page 46, we find minutes by the President of the

Board at that time. The minutes contain proposals for settlement of inams, and, with regard to personal inams to which class the inam in this case relates, at page 53, it is stated as follows :

> "The same course shall be followed in reference to inams of a personal nature. It should first be ascertained whether the title to the inams according to the existing tenure is good ; and if this should be established by the production of a valid grant or by evidence of uninterrupted possession for fifty years, it should then be open to the holder either to retain the inam according to his actual tenure, subject to the liability of lapse and without the power of alienation, or to enfranchise it by payment of an annual quit-rent, or a single fixed sum equal to so many years purchase of the quit-rent."

At page 70, we get rules for the adjudication and settlement of the inam lands of the Madras Presidency. These rules are now part of the Board Standing Orders and find a place in appendices to Chapter III of Volume II of the Standing Orders of the Board of Revenue published in 1966. They apply even now to inams not already enfranchised. In the aforesaid collection of papers relating to the Inam Settlement of the Madras Presidency, Volume I, at page 71, we find mentioned that, if the inam is a personal or subsistence grant, it will be confirmed to the holder according to its actual tenure. The conditions upon which this tenure will be commuted into a freehold, according as the inamdar is a descendant of the original grantee and of the registered holder, or has acquired the inam through an alienation, are set forth below. If the present incumbent is a descendant of the original grantee or of the original registered holder, the inam will be continued to him hereditarily, subject to the existing conditions of the tenure. But an option will be given to the inamdar to convert this restricted tenure into a freehold with full powers of alienation by gift, sale, adoption, or otherwise, by consenting to the payment of an annual quit-rent, calculated according to the rates of the reversionary claim of the Government in each case. After the amount of annual quit-rent has been once fixed for the enfranchisement of each individual inam, it will be open to the holder to redeem it outright by the payment, at once or at any future time, of a single fixed sum equal to twenty years' purchase of the quit-rent. Inams once converted into freeholds in accordance with the foregoing rules will be subjct to no further interference on the part of the Government, except such as may be necessary for the punctual realiszation of the quit-rent charged thereon; and even this degree of interference may be avoided, at the discretion of the inamdar by the purchase, once for all, of the fee simple of the land by paying a sum equal to twenty times the amount of the annual quit-rent. Inams thus enfranchised, either by the payment of an annual quit-rent, or of a single fixed sum equal to 20 years purchase of the quit-rent, will, like every other description of property be subject to the jurisdiction of the Ordinary Courts of Justice in all questions of disputed right, succession, etc., and they may be mortgaged, sold and transferred in any manner, at the will and discretion of the inamdar subject to the payment of quit-rent, if such is not redeemed. On the validity of an inam being established by inquiry conducted in accordance with the foregoing rules a, title-deed will be at once furnished to the inamdar, acknowledging his title to the inam on its present tenure, and specifying the terms upon which this tenure may be converted into a freehold. To say, therefore, that an inam land in respect of which a title deed is issued to the inamdar will continue to be an inam land is meaningless.

We then have the report of Mr. W.T. Blair on the entire operations of the Inam Commission. At page 317 it is stated that, when the title to an inam based on length of possession was once established, it was then to be open to the owner of an inam held for personal benefit either to retain the inam according to his actual tenure subject to the liability of lapse and without the power of alienation, or to enfranchise it by payment of an annual quit-rent or a single fixed sum equal to so many years' purchase of the quit-rent. With regard to service inams, those that were attached to services still required were to be continued intact, but where the services were such that they could not be made available for any useful public purpose the value of the public claims on the land was to be calculated in the form of an annual quit-rent

commutable, at the discretion of the holder, for a sum equal to the present value of the annuity. In paragraph 34, the policy behind this arrangement is found. It is stated there that one essential feature of the rules however deserves special notice, *viz.*, the mode of determining the value of the reversionary interest of Government in different cases. Certain rates of quit-rent were proposed to be charged which were estimated to be equal in value to the full assessment of the inam after a certain period of exemption from land tax—

(1) In the case of inams resumable on the death of the present holders either under the terms of the grant, or on account of defect of title, or owing to the holder possessing no lineal heir, the charge was fixed at half the assessment, which was equivalent to the reversion of the inam after a period of fifteen years.

(2) In the case of persons possessed of terminable heirs, such as a widow with a widowed childless daughter, or of other grants confirmed for two lives, half the above rate was to be levied.

(3) In the case of all other hereditary inams where the chance of lapse from failure of lienal heirs could not be calculated with precision a quit-rent of one-eighth of the assessment was considered sufficiently high to protect the interests of the Government and moderate enough to induce the holders to purchase the freehold. This is equivalent to the resumption of the inam after an exemption from land-tax for a period of forty-five years. In all cases it was declared that the inamdars were at liberty to redeem the quit-rent charged on their inams by a single payment equal to twenty years' purchase. Thus enfranchisement, meant commutation of the value of the Government's right of resumption. After that there was no right of resumption and the land was free from the obligations of inam tenure.

The Madras Enfranchised Inams Act, 1862 has this preamble.

"Whereas under the inam rules sanctioned by Government under date the 9th August, 1859, the reversionary rights of Government are surrendered to the inamdars. In consideration of an equivalent annual quit-rent, and the inam lands are thus enfranchised, and placed in the same position as other descriptions of landed property, in regard to their future succession and transmission. It is hereby enacted as follows".

Section 2 states that the title deed issued by the Inam Commissioner, or an authenticated extract from the register of the Commissioner or Collector, shall be deemed sufficient proof of the *enfranchisement of land previously held on inam tenure.* This will also make the point I have made earlier clear. It may be useful to refer to the Bench decision of this Court in *Gunnaiyan* v. *Kamackchi Ayyar*[1], where the whole question is discussed as follows :—

" In my opinion the enfranchisement of village service inams which are one of the descriptions of inams stands on the same footing so far as the family in which the village office is hereditary is concerned. The enfranchisement consists in disannexing it from the office and imposing, instead of the full assessment, a quit-rent which is generally equivalent to 5/8 of the full assessment. The resumption by Government, therefore is nothing more than that of 5/8 of the assessment or melwaram.

Section 2 of Regulation VI of 1831 (now repealed and superseded by Madras Act III of 1895) declared that all emoluments derived from lands annexed by the State to hereditary village and other offices in the Revenue and Police Departments were inalienable from such offices by mortgage, sale, gift or otherwise and all transfers thereof by the holders of such offices were also declared to be null and void. Section 3 of the same regulation barred the jurisdiction of the Civil Courts to entertain claims to the possession of or succession to such officers or to the enjoyment of any of the emoluments annexed thereto and invested the Collector of the district in which the claim has risen or may arise with authority to adjudicate upon such claims. The effect of enfranchising a service inam is clearly declared by

1. (1903) I.L.R. 26 Mad. 339 at 346, 347 and 348.

Madras Act IV of 1866. Section 1 of that Act enables that a service inam which has been enfranchised from the condition of service by the Inam Commissioner shall be exempt from the operation of Regulation VI of 1831. Section 2 enacts, that the title-deed issued by the Inam Commissioner or an authenticated extract from the register of the Inam Commissioner shall be deemed sufficient proof of *the Enfranchisement of the Land previously held on Service Tenure.* It is thus made abundantly clear that the *effect of enfranchisement and the issue of a title deed by the Inam Commissioner is simply to exonerate the inam from the condition of service and convert it into ordinary property subject to the payment of a quit-rent and not to resume the same from the family or person entitled to the Hereditary Office and make a fresh grant of the same.*

The form of the title deed also makes this clear. The portion of it bearing upon the question runs as follows :—" I acknowledge your title to an inam consisting of the right to the Government revenue on land claimed to be. . acres. This inam being held for service, now otherwise provided for, will be subject to the payment of an annual quit-rent of Rs. . . . . which is hereby imposed upon it in commutation both of the service and of the reversionary interest possessed by Government in the inam. The inam is now confirmed to you in freehold ; in other words, the inam will be your absolute property to hold or dispose of as you think proper, subject only to the payment of the abovementioned quit-rent". It will thus be seen that after acknowledging the existing title of the grantee to the inam, a quit-rent is imposed upon it in consideration of its being exonerated from the burden of service and of the release, by Government, of its reversionary interest therein. The title deed then declares the consequential result of such enfranchisement *viz.*, that the grantee will thereafter hold the inam in freehold, *i.e.*, like any other ordinary property, he will hold the inam as his own absolute property, which he can dispose of as he thinks proper, subject only to the payment of the quit-rent imposed."

I conclude this discussion by a reference to Board Standing Order 53 found in the Standing Orders of the Board of Revenue, Volume II as to the effect of enfranchisement, which is to the effect that in the case of inams enfranchised by the Inam commissioner, whatever be their previous tenure, there should be no interference on the part of the Collector. These inams stand in the same position as ryotwari lands in respect of succession, transfer, sub-division and sale for arrears of quit-rent. The may also be accepted as security for any purpose in the same manner as ryotwari lands.

I shall now refer to another argument based on actual title deed itself, clause 3 of which is as follows :—

> " On your agreeing to pay an annual quit-rent of Rs. 2,810 inclusive of the Jodi already charged on the land as above-stated, your inam tenure will be converted into a permanent freehold, in which case the land will be your own absolute property to hold or dispose of as you think proper, subject only to the payment of the abovementioned quit-rent."

Clause 4 is to the following effect :

> " If you should desire to commute the quit-rent for the payment of a sum of money once for all, equal to twenty years purchase of the quit-rent, you will be at liberty to do so."

While under clause 3 if the title holder agrees to yay an annual quit-rent his inam tenure will be converted into a perment freehold, in which case the and will be his own absolute property to hold or dispose of the same as he thinks proper; under clause 4 if he wants to commute the quit-rent by payment of a sum of money once for all, equal to twenty years purchae of the quit-rent, he would be at liberty to do so. The argument is that, as long as the holder of an enfranchised inam pays the annual quit-rent, there is still some character of the inam attached to that land, but that if he pays the lump sum equal to twenty years purchae of the quit-rent, the land becomes freehold land, and that as it is not the case here, the Government still has

the right of reversion. I think this argument is wholly with unnecessary to repeat all that I have already stated earlier i argument. An inam enfranchised by the payment of annual q fixed sum equal to 20 years purchase of the quit-rent becomes t of the title holder. The only difference between the two is case there is no liability for annual payment of quit-rent. This fically conferred on enfranchised inamdars as a result of the I proceedings and it is a right which no ryotwari pattadar h change the character of the tenure. Reference may be made of the Administration, Volume I, published in 1885 where at p 119 it is stated as follows :—

> "*Perpetual Freeholds.*—Absolute and perpetual freeholds ha Presidency until quite recently, and can now be acquired only of the rules for redeeming the land revenue, building site quit *inam quit -rents*. In regard to the first and second of these m must be observed that inasmuch as land-tax is the main c revenue it is not allowed to be redeemed universally. It is case of lands occupied for building purposes or intended for g of lands in the Neilgherries and the Pulney and Shevaroy hill lands in the Waynad. In all these cases proprietors are allo land-tax the rate of redemption being twenty-five times paid on the land as assessment or quit-rent. The cost of su tion is borne by the person who redeems the assessment. Zamindar alone is given the right to redeem the land rev ryotwai lands the proprietor holding directly from Governr right. Applications for the redemption of land revenue are c tors subject to an appeal to the Board of Revenue. On pay tion money in full, with the cost of survey and demarcation, the assessment is furnished with a titledeed in a certain pr third mode of redemption shown above introduce the questio of this Presidency, but as these are decribed in detail under th mission", it is only necessary here to mention that Inan enfranchised from service or from Government resumption, bu to a quit-rent, may redeem that quit-rent in perpetuity at tw The class of holders mentioned in this paragraph have of cou of alienating, devising or disposing of their land. It will be ol hold is absolute against that demand of the Government o the Governments right to share the produce, and gives no i Government demands, such as for artificial irrigation, educat in all of which cases the land may be subjected to separat The land also will always be liable to attachment, in the sa land, in the event of its becoming obnoxious to any legal pena its attachment or sale. The redemption in (no) way affec of occupancy, or other similar rights; and the *freedom confer against Government.*"

Therefore, the commutation or failure to commute under cl any difference in this case to the character of the tenure. I am sa rnment have no jurisdiction to notify this village under the pro of 1963, as it no longer retains its character as inam. The wri and the notification is quashed. The respondent will pay the pet cate's fee Rs. 250.

S.V.J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE S. GANESAN.

Factors (P.) Ltd. .. *Petitioner**

v.

Amalgamated Commercial Traders (P.) Ltd. .. *Respondent.*

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *section* 70—*Refund of Court-fee—Power of Court under—Mistake or inadvertence—What amounts to.*

Section 70 of the Madras Court-fees and Suits Valuation Act, 1955 specifically provides for refund of Court-fee only in cases where it has been paid by mistake or inadvertence. The 'mistake' contemplated under the section cover only cases of mistake in thinking that the Court-fee was really payable under the law. The fact that a party made a mistake in choosing a remedy, which is either found unnecessary or not maintainable, he cannot claim refund of the Court-fee paid by him correctly according to the proceedings conceived by him. Section 70 has nothing to do with cases of mistake in selection of remedy but would apply only to cases where a mistake has been made in the payment of Court-fee (*i.e.*), when it has been paid in a case where it is not due or payable or it has been paid in excess of what would be payable. Where there is no mistake or inadvertence in the payment of the Court-fees on the value of the remedy sought for, the fact that the plaintiff sought the remedy under a mistake cannot entitle him to apply for refund of Court-fee.

Where the statute is specific and clear Courts cannot normally order refund under its inherent powers, except in cases where it would be unjust to deny refund. Where the suit or appeal has not been registered at all and the party withdraws the same before the Court has taken any action, it can be legitimately contended that the Court-fee paid has not been used at all and in such cases the Court may grant a certificate to enable the party to obtain refund. The Government may also direct refund as an act of grace under section 81 of the Act.

Where a suit has been filed properly valued under the Court-fees Act and it has been numbered, the fact that the plaintiff withdraws the same later on the ground that an earlier suit covers the remedy sought for, it is obvious the mistake lies in the institution of the suit and not in the payment of Court-fees in that suit.

Zahoorunnissa Begum v. *Mohamed Ali*, (1961) 2 M.L.J. 331, differed.

Yandra Brahmam, In re, (1957) 1 An.W.R. 167, followed.

Rathinavel v. *Natchiappa*, (1959) 2 M.L.J. (N.R.C.) 24, Explained.

Decision in *Ambubai Kalidas Pte. Ltd.* v. *Shah Hirachand Shamji*, C.M.P. Nos. 3106 and 3940 of 1963, followed.

(Case-law reviewed—earlier law explained.)

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court, Madras in I.A. No. 5107 of 1966 in O.S. No. 4105 of 1965.

V. Srinivasan and *S.V. Subramanian*, for Petitioner.

K. Venkataswami, for The Additional Government Pleader, for State.

The Court made the following

ORDER.—This revision petition is directed against the order dated 26th October, 1966, passed by the Fourth Assistant Judge, City Civil Court, Madras in I.A. No. 5107 of 1966. The application before the Fourth Assistant Judge, City Civil Court, was filed under section 70 of the Madras Court-fees and Suits Valuation Act, 1955, for refund of the Court-fees under the following circumstances. The petitioner herein filed O.S. No. 4105 of 1965 for recovering a sum of Rs. 3,500 from the defendant as dividend due to him and paid a Court-fee of Rs. 263 in respect of the said claim. On

* C.R.P. No. 1242 of 1967. 24th March, 1969.

the contention of the defendant that the suit was not maintainable, as the petitioner had already filed a comprehensive suit, O.S. No. 301 of 1964 including the claim for Rs. 3,500 the petitioner made an endorsement on the plaint to the effect that the suit O.S. No. 4105 of 1965 had been filed by mistake or inadvertence, that he may therefore be permitted to withdraw the suit without prejudice to his contentions in the earlier suit, O.S. No. 301 of 1964 and that the Court-fee paid by mistake or inadvertence may be ordered to be refunded.

The Fourth Assistant Judge had dismissed the application on the ground that payment of the Court-fee in the suit was not by any mistake or by any inadvertence and that the mistake or inadvertence was with reference only to the filing of the suit in question. Hence the revision.

In *Chidambaram Chettiar, In re*[1], a Division Bench of this Court had, while dealing with a case under the old Court-fees Act (VII of 1870) observed that Courts can order refund only in three cases—(1) where the Court-fees Act applied, (2) where there is an excess payment by mistake and (3) where on account of a mistake of Court a party has been compelled to pay the Court-fees either wholly or in part; and that outside these cases the Courts have no authority to order a refund. The refund of Court-fee on account of excess payment by mistake on the part of a party or a mistake of the Court was ordered by Courts in exercise of their inherent powers.

Under the present Madras Court-fees and Suits Valuation Act (XIV of 1955), however, section 70 had been specifically enacted for dealing with cases of refund of fee paid by mistake or inadvertence of a party to the suit. Section 70 of the Act provides that the Court-fee paid by mistake or inadvertence shall be ordered to be refunded.

I shall now refer to some of the decisions relating to mistake under the old and the new Madras Court-fees Act. In *Thimmayya Naidu* v. *Venkataramanamma*[2], this Court upheld the plea of *bona fide* mistake and purporting to act under its inherent powers ordered the issue of a certificate recommending refund in a case where a party in an appeal to the High Court under the Land Acquisition Act paid in the first instance *ad valorem* Court-fee on the amount of the award, when a lesser Court-fee was payable, if the relief was treated as one for a mere declaration. This Court upheld the plea that he had paid excess Court-fee erroneously.

In *Chidambaram Chettiar, In re*[1], already cited, this Court refused the request for refund in a case where the appeal was dismissed as withdrawn. The learned Judges disapproved of the decision of the Calcutta High Court in *Galstaun* v. *Raja Janakinath Roy*[3], where refund was ordered in a case where the appeal which was barred by limitation was filed late because of mistaken legal advice.

In *Ramakrishnayya* v. *Seshamma*[4], this Court, while dealing with a case under the old Act VII of 1870, rejected the claim for refund in the following circumstances. The reversioner filed a suit against the widow and other alienees challenging the genuineness of a will left by the deceased, conferring absolute title on the widow and the alienees. The suit was one for declaration, but subsequently he obtained a surrender from the widow, converted the suit into one for possession and asked for refund of Court-fees in respect of the relief relating to the declaration of the will, claiming that this relief has since become unnecessary as a result of the surrender, he had obtained from the widows. The Court observed that, as the plaint originally stood, the plaintiff rightly considered the relief relating to the will as essential and that the fact that by his having altered the suit and claimed a higher relief, the prayer relating to the will has become since unnecessary, can make no difference whatsoever. With great respect to the learned Judge, the proper question which should have been posed was whether Court-fees paid was really payable or not under the provisions of the Act VII of 1870 on the relief relating to the declaration in respect of the will;

1. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.
2. I.L.R. (1932) 55 Mad. 641 : 62 M.L.J. 541.
3. (1934) 38 Cal.W.N. 185.
4. (1935) 68 M.L.J. 369.

and the question did not depend upon the opinion of a plaintiff about the necessity of the relief in a suit. If the view of the learned Judge has to prevail, it would be open to a plaintiff to give up a relief at a subsequent stage as being unnecessary and to claim refund on the ground that he had mistakenly thought at the time of institution of the suit that the relief was essential.

In *Kappini Gounder*, In re[1], a Bench of this High Court refused to order refund in exercise of its inherent powers when the appeal was dismissed as withdrawn having been settled out of Court. The learned Judges observed that, while a refund was permissible in the case of a mistake of a party, or in case of a wrong order of Court the inherent power should not be exercised in a case where Court-fee had been properly paid. If the Court-fee properly paid is refunded that would render nugatory the express provisions of the Court-fees Act and that it is elementary that no Court has inherent power to do that which is prohibited by statute.

In *Tej Bahadur* v. *Peartlal*[2], the Allahabad High Court declined to grant a certificate when the second appeal which was found not entertainable was permitted.

In *Yandra Brahmam*, In re[3], the Andhra High Court while dealing with section 66 of the Andhra Court-fees and Suits Valuation Act (VII of 1956) which is practically identical with section 70 of the Madras Court-fees Act, 1955, refused to accept the contention that a mistake which lay in the choice of the remedy and which consequently resulted in the payment of Court-fee must also be regarded to be the result of mistake or inadvertence. The learned Judges observed that section 66 of the Andhra Court-fees Act had nothing to do with a mistake in the selection of the remedy but related only to cases where the mistake had been committed in payment of Court-fee, *i.e.*, where payment has been made though it is not due or the Court-fee has been paid in excess. In that instance a writ petition was filed by mistake.

In the unreported decision of a Division Bench of this Court in *Atmubai Kalidas Pte. Ltd.* v. *Shah Hirachand Shamji*[4], section 70 of the Madras Court-fees Act came up for direct consideration. In the first of two cases dealt with in that judgment, an appeal was filed when under the law no appeal lay, and in the second appeal was filed on a misapprehension as to the existence of an order which did not in fact exist. In both the cases there was no mistake in regard to the Court-fee that was paid on the memorandum in the sense that the amounts paid were other than what would be payable under the provisions of the Madras Court-fees Act; and the contention was that there was a *bona fide* mistake in filing the appeals themselves, as under the law, such appeals were not competent. While rejecting the plea for a refund on the ground of mistake, Ramachandra Iyer, C.J., who delivered the judgment on such payment is really consequent on the mistake in conceiving that the proceedings lay where none exist under the law.

The law on the subject is thus fairly clear. In order to claim a refund of fee paid by mistake or inadvertence, under section 70 of the Court-fees Act, 1955, the party must, in the first place, establish that no Court-fee was payable at all by him or that excess Court-fee had been paid. In the second place, he must go further and establish that the payment was due to his mistake in thinking that the amount paid as Court-fee was really payable under the provisions of the Court-fees Act. Where, however, the payment had been made out of a mistake on his part in the choice of a remedy no refund can be claimed, as the payment evidently has not been made due to any mistaken belief that the same was really due under the Court-fees Act. It is also open to him to establish that the payment was due to his inadvertence, in other words that he had wrongly paid the Court-fee by oversight or negligence.

It also appears to be clear that, after the enactment of the Madras Court-fees and Suits Valuation Act, 1955, there is really no scope at all for the exercise of inherent powers by Courts to order refund of Court-fees. As I have already

1. (1937) 2 M.L.J. 788.
2. A.I.R. 1967 All. 734.
3. (1957) 1 An.W.R. 167.
4. C.M.P. Nos. 3106 and 3940 of 1963.

observed, this Court has in *Chidambaram Chettiar, In re*[1], defined the scope of the exercise of inherent powers in regard to refund of Court-fee paid and had clearly restricted the same to only two cases *i.e.*, excess payment made by mistake of party and excess payment as a result of a mistake of Court. Admittedly cases of payment by a party as a result of mistake or inadvertence are now specifically covered by section 70; and section 12 (4) of the Act XIV of 1955 provides that the appellate Court is bound to order a refund of the excess Court-fee when it reduces the Court-fee fixed by the trial Court. The provisions of section 12 (4) evidently do not appear to have been brought to the notice of Rajagopalan, J., in the case reported in *Rathinavel* v. *Natchiappa*[2], wherein he had observed that, while dealing with a case where the appellate Court reduced the fees determined by the trial Court, section 70 would govern such cases of mistake also, the mistake being that of the lower Court which was rectified by the appellate Court.

The only exception where the Court will exercise its inherent powers relates not to cases of refund but only to cases where the doctrine of unjust enrichment can be successfully invoked by a party. Where the application, suit or appeal had not been registered or numbered and consequently not heard by the Court, but stamps had been defaced by the officers of Court, and if the proceedings are withdrawn by the party before the Court would take any action, it can be legitimately contended that the Court-fee paid was not used at all and that the State had not expended any time or labour in disposing of the matter; and it would be open to the Court in such cases to issue a certificate setting forth those circumstances for enabling the party to obtain refund of the Court-fee. Inherent powers are exercised by Courts in such cases with a view to avoid obvious injustice; and it would be open to the Government to order refund as an act of grace, acting under section 81 of Act XIV of 1955, on an application by the party who produced the certificate. This view had been endorsed by the Division Bench of this Court in the unreported case cited *supra*.

In the present instance, it is not disputed that the Court-fee paid on the suit O.S. No. 4105 of 1965 was payable under the provisions of the Court-fees Act and that the suit had been withdrawn as unnecessary only on the contention of the defendant that the suit was not maintainable, as the petitioner herein had already filed a comprehensive suit O.S. No. 301 of 1964 including the claim for Rs. 3,500 covered by the suit O.S. No. 4105 of 1965. It is obvious that the mistake lay in the institution of an unnecessary suit and not in the payment of Court-fees.

The learned Counsel for the petitioner strongly relies on the decision of Ramachandra Iyer, J. (as he then was) in *Zahoorunnissa Begum* v. *Mohamed Ali*[3] in which it was held that section 70 of the Act would cover a mistake which arises as a result of the adoption of an erroneous procedure. In that case a suit was filed by mistake in a case which requires only a petition under section 47, Civil Procedure Code, and on objection by the respondent the party was permitted to convert it into an application under section 47, Civil Procedure Code, which involved a lesser Court-fee. This judgment was subsequently considered by Ramachandra Iyer, J. and Ramakrishnan, J., in the unreported decision cited *supra*, and the Division Bench approved of this case by observing that that was a case where, although the proceedings were initiated as a suit, what the party intended to file was really with respect to certain matters arising in execution of a decree which in certain circumstances can be made by an application and in certain others only by a suit and that the fact that the proceedings were called a suit, cannot alter its essential nature.

With great respect I regret that I am unable to follow the decision in *Zahoorunnissa Begum* v. *Mohamed Ali.*[3] In that case the suit was converted into an application with the permission of the Court, as the suit was not the appropriate remedy and was not maintainable under the circumstances, and it is not suggested that the Court-fee paid on the suit as framed was not really due or had been paid

1. (1934) 67 M.L.J. 321 : I.L.R. 57 Mad. 1028.
2. (1959) 2 M.L.J. (N.R.C.) 24.
3. (1961) 2 M.L.J. 331.

in excess under the provisions of the Court-fees Act. As rightly pointed out by the Andhra High Court in *Yandra Brahmam*, In re[1], a mistake in the choice of of remedy cannot be equated with the wrong payment of Court-fee due to mistake or inadvertence. The mistake in the choice of procedure, in my view, is entirely different from a mistake in the payment of Court-fees and is not covered by section 70 of the Court-fees Act. The mistake in that case did not lie in thinking that excess Court-fees was really due on the suit under the provisions of the Court-fees Act. The said decision, in my view, does not appear to be correct and, in any event, must be confined to the facts of that case.

In any event, I am clear that the petitioner cannot succeed on the strength of the said decision. Admittedly there is no mistake of procedure here and the mistake lay in filing a suit which was obviously unnecessary in view of the institution of a comprehensive suit earlier.

In the result, this civil revision petition is dismissed; but under the circumstances, without costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE K. N. MUDALIAR.

K. C. Devassay .. *Appellant**

v.

The State of Madras, represented by the Secretary, Home Department and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 29 *and* 10 (3) (a) (*i*)—*Power under section* 29, *when may be invoked*—Bona fide *requirement of landlord under section* 10 (3) (a) (*i*)—*If includes the requirement of his daughter.*

If the landlord has a remedy under the Act itself the State Government cannot invoke, in his favour, its powers under section 29. The power under section 29 is a not a substitute for a relief permissible under the Act itself.

Section 10 (3) (*a*) (*i*) says that a landlord may apply for eviction of a tenant, in case it is a residential building, if he requires it "for his own occupation or for the occupation of his son." The rationale behind the inclusion of the son is that the ground of eviction should be available to a landlord for the occupation of his nearest kith and kin. The case of a daughter is *a fortiori* and there is no reasonable justification for differentiating a son from a daughter. If a son is within the phraseology of section 10 (3) (*a*) (*i*), as he is, the daughter can reasonably be read into it.

Appeal under Clause 15 of the Letters Patent, against the order of the Honourable Mr. Justice Kailasam in W.P. No. 200 of 1968 dated 10th October, 1968.

T. R. Srinivasan, T. S. Subramanian and *K. Ramamurthy*, for Appellant.

The Government Pleader and *R. D. Indrasenan*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, C.J.—By an order dated 22nd November, 1967, the State Government, in purported exercise of its powers under section 29 of the Madras Buildings (Lease and Rent Control) Act, 1960, exempted the ground floor of premises No. 13, Muthukrishna Mudali Street, Mylapore, from the provisions of section 10 of the Act. The tenant sought to quash this order, but unsuccessfully. The appellant contends that the order proceeded on a wrong assumption that the landlord had no remedy under the Act, and, therefore, the powers under section 29 were available in this case:

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1. (1957) 1 An.W.R. 167.

*W.A. No. 488 of 1968. 24th June, 1969.

This is what the Government stated in its order:

"The Government have come to the conclusion that the request of the landlord is reasonable and *bona fide* and that the landlord has no remedy under the Act as he cannot evict the tenant through Court under section 10 (3) of the Madras Buildings (Lease and Rent Control) Act, 1960 on the ground of occupation of his daughter and her family."

It seems to us that this view, which forms the basis for the exercise of the powers under section 29, cannot be supported. It is clear from the impugned order itself that the State Government was well aware that, if a landlord had a remedy under the Act, it could not invoke, in his favour, its powers under section 29. If authority is needed, reference may be made to *Globe Theatres Ltd.* v. *State of Madras*[1], and *Pannalal Jagannath Prasad Gupta* v. *State of Madras*[2]. The first of these decissions, to which one of us was a party, held that, if the desired eviction could be secured under the terms of the Act itself, there should be no occasion at all to grant any exemption from the operation of the Act and that the exemption was not a substitute for a relief permissible under the Act itself. One of us, sitting singly followed and reiterated that view in the second case cited. We consider that it is still the position.

But, it is pressed upon us that, having regard to the language of section 10 (3) (*a*) (*i*) of the Madras Buildings (Lease and Rent Control) Act, 1960, we should hold that the *bona fide* requirement of a daughter is not within its scope. That clause says that a landlord may apply for eviction of a tenant in case it is a residential building, 'if he requires it for his own occupation or for the occupation of his son'. The rest of the requirement for the application of the sub-section is not material in the present context. It is suggested that a liberal meaning should be given to the words "for his own occupation or for the occupation of his son" and a daughter should be held to be not within the phraseology. In our view, in delimiting the scope of this provision, regard must be had to the social set-up and the family life with its surroundings. An undivided son who is married naturally may desire to live apart and the father may possibly regard that as a requirement of the premises for his own occupation. But, since the Legislature has also used the language "for the occupation of his son" it is urged that this is an indication that, at least, a daughter is not taken into account. The rationale behind the inclusion of the son is that the ground of eviction should be available to a landlord for the occupation of his nearest kith and kin. Where to draw the line may be left to particular cases. But the case of a daughter is to our mind *a fortiori* and, we can see no reasonable justification for differentiating a son from a daughter in the matter of requirement of the landlord for purposes of his own occupation. It should not be lost sight of that the statutory protection of tenancy is a departure from the normal provision controlling the relationship of landlord and tenant under the Transfer of Property Act, and, we should think that, for that reason, it should receive a liberal interpretation so as to mitigate, where necessary, the rigour on the landlord. That is not to say that, on a matter like that, one is expected to lean in favour of a landlord. We suggest no such thing at all, but, in balancing the facts, a reasonable view should be taken as to who is the nearest kith and kin the necessity of whose occupation in the premises may be viewed as the necessity of the landlord's own occupation.

Saraswathi v. *Vadivelu Chettiar*[3], was prepared to exempt the provision to the benefit of the husband of the landlady. Whether we go to that extent or not, we are clear that, if a son is within the phraseology of section 10 (3) (*a*) (*i*), as he is, the daughter can reasonably be read into it.

On that view, it would follow that the landlord, in the instant case, could well have resorted to the remedies available under the Act. Since that remedy is available, the result is that the power under section 29 cannot be invoked.

1. (1961) 1 M.L.J. 85.
2. (1962) 1 M.L.J. 426.
3. (1967) 2 M.L.J. 81.

On that view, the appeal is allowed and the impugned order is quashed, but, in the circumstances, there will be no order as to costs. The disposal of this writ appeal will not, however, bar the landlord from resorting to the remedy available to him under the Act.

V.K. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE N. KRISHNASWAMY REDDY.

Md. Saduddin Samdani .. *Appellant**

v.

State (Accommodation Deputy Tahsildar) Madras .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *sections* 17 (1) *and* 33—*Scope—Landlord not to cut off or withhold amenities enjoyed by the tenant without sufficient cause—No tenant at the time of the alleged act—Conviction and sentence, if justified.*

Madras Buildings (Lease and Rent Control) Act, (XVIII of 1960), *sections* 3 (5) *and* 3 (9) (a) (i)—*Scope—Forcible taking of possession by the Accommodation Controller on refusal of the landlord to deliver possession—Forcible possession permitted only after seven days' notice—Non-compliance—Conviction and sentence to be set saide.*

Section 17 (1) of the Madras Buildings (Lease and Rent Control) Act, 1960 says that no landlord shall, without just or sufficient cause cut off or withhold any of the amenities enjoyed by the tenant or be in any way responsible for the amenities being cut off or withheld. It is clear from this provision that the premises should have been occupied by a tenant and it must be under his enjoyment and if during such enjoyment, the landlord cuts off or withholds the amenities without just or sufficient cause, it will come within the mischief of section 17 (1). At the time when the amenities were alleged to have been cut off, there was admittedly no tenant. The previous tenant was evicted on 7th October, 1966. The Accommodation Controller had taken possession only on 29th October, 1966. The amenities were cut off even before taking possession. Therefore, this section will not apply and the conviction and sentence under section 17 (1) read with section 33 have to be set aside.

In the present case the appellant had not delivered possession and his defence was that he had preferred an appeal against the order of the Accommodation Controller to the Government and the appeal was then pending, and so, he could not deliver possession. If the building is not delivered, the Accommodation Controller by virtue of section 3 (9) (*a*) (*i*) of the Act can take forcible possession. Under the proviso to the same section, the Accommodation Controller should give notice, not less than seven days before taking forcible possession. On facts, it is clear that permission for the occupation of the building to the landlord was refused on 21st October, 1966. On 27th October, 1966, the appellant was asked to hand over possession. On 29th October, 1966, forcible possession was taken. The required seven days' notice was not given. Within two days, after the notice was given, action was taken. No time was fixed in the notice. This is clearly illegal. It cannot, therefore, be said that the appellant committed an offence under section 3 (5) of the Act. Therefore, conviction and sentence under section 3 (5) have to be set aside.

Appeal against the Judgment of the Chief Presidency Magistrate of the Court of Presidency Magistrate, Egmore, Madras in C.C. No. 1366 of the Calendar for 1967.

C. K. Venkatanarasimhan, for Appellant.

The Additional Public Prosecutor, *S. Jagadesan*, and the Assistant Public Prosecutor, for State.

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*Crl. A. No. 730 of 1967. 19th December, 1969.

The Court delivered the following

JUDGMENT.—The appellant-landlord was convicted under section 3 (5) and section 17 (1) read with section 33 of the Madras Buildings (Lease and Rent Control) Act, 1960 (hereinafter called ' the Act' and sentenced to pay a fine of Rs. 250 under each count (Rs. 500 in all), by the Chief Presidency Magistrate, Madras. The prosecution case is this: The appellant, Md. Saduddin Samdani is the owner of premises No. 6, Jani Khan Street, 1st Lane, Royapettah, Madras, the monthly rent of which was Rs. 65 and this building was subject to the provisions of the Act. This building was occupied by a private tenant and it was vacated on 7th October, 1966. Under section 3 of the Act, the owner is required to intimate the accommodation Controller the vacancy of the building whenever there is any, within seven days. Accordingly, the appellant informed the Accommodation Controller about the vacancy under a letter dated 13th October, 1966, which was within seven days. In the same letter, he requested for release of the said premises to enable him to occupy the same as he found it difficult to live with other members of his family in another house owned by the family. On receipt of this letter, the Inspector attached to the Accommodation Controller's office (P.W. 2) inspected the premises on 18th October, 1966 and made a report to the Accommodation Controller that the house was electrified and was also in a tenantable condition. Thereafter, the Accommodation Controller wrote to the appellant on 21st October, 1966, rejecting the request of the appellant for allotment of the house for his own occupation and informing him that it should not be let out to anybody else. The said order also required that the appellant should hand over possession of the house to the person authorised by the Accommodation Controller. On 24th October, 1966, the Accommodation Controller allotted the house to one Shanmugam, Assistant Professor, English, Teacher's College, Saidapet (P.W. 1). The appellant told him that he had preferred an appeal against the order of the Accommodation Controller and that he would not handover possession to him.. P.W. 1 accordingly informed the Accommodation Controller by his letter dated 26th October, 1966. In the meanwhile, the appellant appealed to the Government against the order of the Accommodation Controller-*vide* Exhibit D-6. On receipt of the report from P.W. 1 the Controller wrote to the appellant on 27th October, 1966 i forming him that he should hand over possession immediately on receipt of his reference failing which possession of the premises would be recovered forcibly under section 3 (9) of the Act. On 29th October, 1966, as per the instructions of the Controller forcible possession of the premises was taken and the allottee, namely, P.W. 1 was asked to take possession of the premises. It was also noted that at the time of taking possession, the premises required the following repairs; (*i*) re-wiring to the premises; (*ii*) repairs to the flooring in the kitchen; and (*iii*) repairs to windows and ventilators.

On the appeal petition filed by the appellant to the Government, the Government had passed an order on 7th November, 1966, requesting the Accommodation Controller not to proceed with the allotment of the premises pending orders on the said petition. On the same appeal, final orders were passed on 25th February, 1967, dismissing the appeal petition stating that the Government did not find any reason to reconsider the orders issued by the Accommodation Controller.

On the report of the Accommodation Inspector that the house was not in a tenantable condition and that P.W. 1 could not occupy the house, the Accommodation Controller filed a petition against the appellant before the Rent Controller praying for restoration of the amenities; and against the order of the Rent Controller, the appeal by the appellant is said to be still pending. The Accommodation Controller also filed a complaint before the Court against the appellant for having failed to deliver possession of the building in a tenantable condition to the authorised officer or to the allottee named by the authorised officer and also for having cut off the amenities without just or sufficient cause.

The case of the appellant is that the previous tenant who had been evicted from the premises after protracted proceedings before the Rent Controller had

caused mischief to the house by pulling down window panels, electrical installation and also damaging the floor. He further stated that he was not responsible for any mischief done to the premises. He further stated that he could not deliver possession of the premises since he had filed an appeal to the Government and that while the appeal was pending, the Accommodation Controller had taken forcible possession of the premises and, therefore, he did not commit any of the offences.

He examined two witnesses on his side, D.W. 1, a retired Bailiff who executed the warrant of eviction against the previous tenant stated that he handed over possession of the same after evicting the tenant and when possession was handed over, the electric wires were found pulled out, the window panels missing and flooring damaged at the downstairs. D.W. 2 is the brother of the appellant and he spoke about the proceedings taken against the previous tenant and also the appeal filed by the appellant to the Government in respect of the occupation of the premises by the appellant.

The conviction of the appellant under section 17 (1) of the Act cannot be sustained. Section 17 (1) of the Act says that no landlord shall, without just or sufficient cause cut off or withhold any of the amenities enjoyed by the tenant or be in any way responsible for the amenities being cut off or withheld. It is clear from this provision that the premises should have been occupied by a tenant and it must be under his enjoyment and if during such enjoyment, the landlord cuts off or withholds the amenities without just or sufficient cause, it will come within the mischief of section 17 (1). At the time when the amenities were alleged to have been cut off, there was admittedly no tenant. The previous tenant was evicted on 7th October, 1966. The Accommodation Controller had taken possession only on 29th October, 1966. The amenities were cut off even before taking possession. Therefore, this section will not apply and in the result, the conviction and sentence under section 17 (1) read with section 33 of the Act are set aside.

Even in respect of the contravention of section 3 (5), the conviction, in my view, under that section is also unsustainable. It is the admitted case that the appellant had not delivered possession and his defence was that he had preferred an appeal against the order of the Accommodation Controller to the Government and the appeal was then pending, and so, he coud not deliver possession. If the building is not delivered, the Accommodation Controller by virtue of section 3 (9) (*a*) (*i*) of the Act can taken forcible possession. Section 3 (9) (*a*) (*i*) reads thus:

"Any officer empowered by the Government in this behalf may summarily dispossess any landlord, tenant, or other person occupying any building in contravention of the provisions of this section *or any landlord who fails to deliver to the Government possession of any building* in accordance with the provisions of sub-section (5) and may taken possession of the building including any portion thereof which may have been sublet. The Government shall be deemed to be the tenant of such building with effect from the date of taking such possession."

The Proviso which is very relevant in this case reads thus:

"Provided that in cases where any landlord has been refused permission for the occupation of a building under clause (*c*) of sub-section (8), not less than seven days' notice shall be given before action is taken under this sub-section.".

It is, therefore, contended by virtue of this proviso, by the learned Counsel for the appellant that after the appellant has been refused permission for occupation of the building which was on 21st October, 1966, if the landlord (appellant) had refused to deliver possession under section 3 (5), the Accommodation Controller should have given notice, not less than seven days before the forcible possession was taken by him. From the facts of this case, it is clear that permission for the occupation of the building to the landlord was refused on 21st October, 1966. On 27th October, 1966 (Exhibit P-9) the appellant was asked to hand-over possession. On 29th October, 1966 (Exhibit P-10), forcible possession was taken under section 3 (9) (*a*) (*i*) of the Act. Seven days' notice required by the proviso to section 3 (9) (*a*) (*i*) was not admittedly given to the appellant. Within

two days after the notice was given, action was taken. Even in the notice dated 27th October, 1966 (Exhibit P-9), the appellant was not required to handover possession within seven days from the receipt of the notice. No time was fixed in the notice. This is clearly illegal. It cannot, therefore, be said that the appellant committed an offence under section 3 (5) of the Act. If the Accommodation Controller had taken forcible possession under section 3 (9) (a) (i), it is doubtful whether the appellant could be proceeded under section 3 (5) for having refused to deliver possession. The conviction and sentence under section 3 (5) are also set aside.

It is a very unfortunate case where no one had occupied the building for about three years and it was lying vacant. The Government should have taken steps, even if certain repairs were required for the occupation of the house, to do such repairs and allow the allottee to occupy the house and recoup the amount spent by the Government for such repairs, from the owner of the house. It is for the appellant to seek his remedy in the appropriate forum for the non-occupation of the house.

In the result, the appeal is allowed. The fine, if paid, will be refunded to the appellant.

V.M.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

Duraisami Nadar, and another .. *Petitioners**

Prevention of Food Adulteration Rules (1955), *rule* 28 *and Appendix B, clause A*-04—*Scope*—*Sale of compounded asafoetida containing colouring matter* (*R.N., water soluble dye*)—*Accused, if guilty of misbranding.*

The orange R.N., water soluble dye, not being one of the permissive coal tar dyes within the ambit of rule 28 of the Prevention of Food Adulteration Rules, 1955, the accused having sold miskey asafoetida were guilty of misbranding.

Petition under sections 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the Judgment of the Court of the Sessions Judge, Tirunelveli, dated 31st January, 1969 and made in C.A.No. 151 of 1967 (C.C.No. 213 of 1967 on the file of the Court of the Additional First Class Magistrate, Tirunelveli).

N.T. Vanamamalai, for Petitioner.

R. Gandhi, for Public Prosecutor, and the Additional Public Prosecutor, for State.

The Court made the following

ORDER :—The two petitioners (accused 1 and 2) seek to revise their conviction under section 16 (1) (a) (i) read with section 7 (ii) of the Prevention of Food Adulteration Act, 1954.

On 31st March, 1967 at about 9-30 A.M. accused-2, the salesman employed by accused-1 in his grocery shop was found in possession of compounded miskey asafoetida for sale. Accused-1 was the owner of the grocery shop. Accused-2 sold six ounces of the compounded miskey to the Food Inspector P.W. 1, which on analysis was found to be misbranded. It is unnecessary for me to notice the other facts or the circumstances of the case for meeting the argument of the learned Counsel (Mr. Vanamamalai).

Firstly, it was argued that the examination of the Public analyst of the sample in question revealed the result to the effect that the sample is artificially coloured by the addition of orange R.N., water soluble dye, derived from coal tar. The public analyst was of further opinion that as per clause A-04 in Appendix B to the Prevention of Food Adulteration Rules, 1955 compounded asafoetida should not contain any added colouring matter. He expressed his opinion that the sample was misbranded.

*Crl. R.P. No. 128 of 1969. 20th January, 1970.

On the basis of the contents of Exhibit P-3, the learned Counsel argued that the prosecution has not really proved that the orange R.N., water soluble dye, derived from coal tar does not fall under the permissive coal tar dyes enumerated in rule 28. I am not able to accept this argument, for, it is crystal clear that the orange R.N., water soluble dye is certainly not one of the permissive coal tar dyes within the ambit of rule 28. If that were so, it was certainly open to the accused to cite the public analyst and examine him or cross-examined for the proof of orange R.N., water soluble dye as one of the permissive coal tar dyes within the meaning of rule 28. Later Mr. Vanamamalai was fair enough to bring it to the notice of the Court the ruling in *B. Suryanarayana*, In re[1], and argued on the basis of the reasoning found in that judgment, that orange R.N., water soluble, dye does not come within the ambit of rule 28.

Mr. Vanamamalai argued about the lack of proof of the sample being mis-branded but later in view of the terms of section 16 (1) (*a*) (*i*) and section 2 (*ix*) (*j*) and (*k*) of the Act the argument was abandoned.

Mr. Vanamamalai eloquently pleaded that the quantity of the sample sent to the public analyst is not in consonance with the quantity prescribed under the rules. But he made it clear that he was pressing this only for the purpose of extenuating the crime. As long as the public analyst does not find the quantity insufficient to render an analysis fruitless or nugatory, this argument would not avail the petitioner.

It was certainly open to the Public Health Authorities to have pursued the matter and found out whether the vendor of this asafoetida is also equally guilty of the crime. It is certainly not the case of the prosecution that accused 1 or accused 2 had anything to do with the preparation of this admixture found in the sample. In view of this and certain other circumstances of the case, I consider that this is a case fit for reducing the sentence to the period of imprisonment already undergone by the petitioners Accused-1 is sentenced to pay a fine of Rs. 500 and in default to undergo rigorous imprisonment for six months. Time for payment of the fine one month from now.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice*, AND MR. JUSTICE P.R. GOKULA-KRISHNAN.

The State of Madras represented by the Deputy Commissioner (C.T.) Madras Division, Madras-6. .. *Petitioner**

v.

Thiru Prem Industrial Corporation, No. 10/11, Industrial Estate, Guindy, Madras-32 .. *Respondent.*

Central Sales Tax Act (*LXXIV of* 1956), *sections* 10-A *and* 10 (*b*)—*Scope—Offence of misuse of* ' C' *Forms—Levy of penalty—Penalty to be one and a half times the tax—The words* " *if the offence had not been committed*" *to be given effect to.*

On the question whether, for the offence of misusing ' *C* ' Forms under section 10 (*b*) of the Central Sales Tax Act, 1959, the department could levy penalty at 10½ per cent, *held that*, the words " if the offence had not been committed " in section 10-A clearly points to the result that the tax for purposes of assessing one and a half times thereof is not that which would have been levied on the basis that the ' *C*' Forms had not been complied with or have been misused, but, as if they have been used in a proper way.

Petition under section 38 of the Act I of 1959, praying the High Court to revise the order of the Court of the Sales Tax Appellate Tribunal (Second Additional Bench) Madras, dated 9th May, 1968 and made in T. A. No. 2321 of 1966

1. (1968) 2 An.W.R. 135 : (1968) M.L.J. (Crl.) 443.

* T.C. No. 226 of 1969. 30th July, 1969.
Revision No. 151 of 1969.

(Appeal No. C.S.T. 185/63-64 dated 29th August, 1966 relating to the assessment year, 1961-62 on the file of the Appellate Assistant Commissioner of Commercial Taxes IV Madras City),—(C.S.T. No. 3636/61-62, dated 2nd December, 1963 on the file of the Assistant Commercial Tax Officer, T. Nagar Division)—(C.S.T. S.M. No. 3636/61-62, dated 31st March, 1963 on the file of the Deputy Commercial Tax Officer, T. Nagar Division, Madras-17).

The Assistant Government Pleader (C.T.), for Petitioner.

The Judgment of the Court was delivered by

Veeraswami, C.J.:—The Revenue seeks to revise an order of the Sales Tax Appellate Tribunal by which it modified the penalty imposed. It is not in controversy, and indeed, as found by the Tribunal, that the '*C*' Forms had been misused and thereby an offence was committed within the scope of section 10 (*b*) of the Central Sales Tax Act, 1956. The Department levied penalty at 10½ per cent. on the view that, in the circumstances, the concessional rate would not be available and that the assessee would be liable to tax at 7 per cent. under section 8 (2). The Tribunal reduced the penalty to one and a half times the tax, as, in its opinion, for purposes of levying penalty, the rate of tax should be taken as that which would have been applicable if the offence had not been committed.

We think the Tribunal's view is correct. The Department's view does not give effect to the concluding words of section 10-A, "if the offence had not been commited." The penalty under the section should not exceed one and a half times the tax which would have been levied under the Act in respect of the sale effected by the assessee if the offence had not been committed under section 10 (*b*). The offence under that provision is that a person being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration. The words "if the offence had not been committed" clearly points to the result that the tax for purposes of assessing one and a half times thereof is not that which would have been levied on the basis that the '*C*' Forms had not been complied with or have been misused, but, as if they have been used in a proper way. If that were not the case, there would be no meaning to the last words we have referred to.

Our attention has been invited to *M. Pais and Sons* v. *The State of Mysore*[1] It is true the Mysore High Court, in this case, took a view which is in support of that taken by the Department in this case. But, with due respect, the decision does not take into account the concluding words "if the offence had not been committed" in section 10-A. The tax case is dismissed.

V.M.K. — *Tax case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. N. MUDALIYAR.

S.P. Naidu .. *Petitioner.**

Madras Preservation of Private Forest Act (XXVII of 1949), section 3 (2)—Scope—Clearing of undergrowth and erection of shed, if covered by the phrase "as an act done for the usual or customary domestic purpose".

The proviso to section 3 (2) of the Preservation of Private Forest Act, 1949 *inter alia* provided that nothing contained in sub-section 3 (2) shall apply to the removal of dead or fallen trees or to any act done for the usual or customary domestic purposes or for making agricultural implements. The act of the accused a labourer of the estate in clearing the undergrowth on the borders of the estate and erecting a shed for the purpose of residing therein, cannot be placed beyond the pale of the phrase "as an act done for the usual or customary domestic purposes"

1. (1966) 17 S.T.C. 161.

* Crl.R.C. No. 62 of 1969.
Crl. R.P. No. 62 of 1969.

5th January, 1970.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional Magistrate, Gudalur, dated 28th August, 1968 and passed in C.C. No. 273 of 1968.

R. Vaidyanathan, for Petitioner.

R. Gandhi, for Public Prosecutor, for State.

The Court made the following

ORDER.—This revision petition is directed against the conviction of the petitioner under sections 3 (2) and (7) of the Madras Preservation of Private Forest Act, 1949.

In essence, the complaint of the prosecution is that in S. No. 567 of Nelliyalam Village, the forest officials found one Ramakrishnan cutting earth and clearing the undergrowth for about a quarter acre and building the shed therein. On the evidence of P.Ws. 1 and 2 that there has been clearance of the undergrowth in the area in question (4½ grounds), mainly the conviction is based.

Mr. R. Vaidyanatha Iyer, Counsel for the Petitioner assailed the conviction on the ground that the learned Sub-Magistrate has really misappreciated the evidence on record; that the learned Magistarate has further erred in interpreting the proviso to section 3 (2) of the Act.

P.W. 1 states in chief-examination that one Ramakrishnan has cut the earth and was building a shed measuring 22'×12'. The earth was cut for about ¼ acre. His further evidence is that the shed is in the occupation of Ramakrishnan, a labourer, of the estate. P.W. 2 says that he enquired Ramakrishnan who was residing in the shed and that Ramakrishnan said that he collected the poles from the trees in S.No. 567 itself. According to this witness, the ground is levelled and the soil is disturbed by Ramakrishnan. His further evidence is that the act of removing the mud diminishes the utility of the forest and diminishes the forest. He further speaks to the fact of Ramakrishnan being an employee of the Estate and of the shed having been constructed for his occupation. On this evidence alone, the prosecution ought to have failed, for it is true the accused was under instructions directing the cutting of the trees or reeds in the area in question *viz.*, 4½ grounds in an area of 4,500 acres. I am afraid cutting trees or reeds has to be read in the context of the accused doing any act likely to denude the forest or diminish its utility as a forest. I am not in a position to interpret that the clearance of 4 grounds, although there is the cutting of trees or reeds, would be an act likely to denude the forest or its utility as a forest. There is the further protection for the accused, supplied from the proviso to sub-section (2) of section 3 of the Act. The proviso runs as follows:

> "Provided that nothing contained in this sub-section shall apply to the removal of dead or fallen trees or to any act done for the usual or customary domestic purposes or for making agricultural implements".

It is argued before me that this cutting of reeds or undergrowth was necessary for erection of a shed for the habitation of Ramakrishnan, the labourer of the Estate such an act is done for the usual or customary domestic purpose of the Estate.

In properly appreciating the evidence of D.Ws. 1 and 2, the learned Magistrate erred, and attached unnecessary importance to the omission of the word 'domestic' in the evidence of D. Ws. 1 and 2 who are respectable witnesses and who could speak about the conditions and customary practices of the estate with first-hand knowledge and without any motive whatever. The mere omission of the word 'domestic' would not render their evidence unacceptable and the act of the accused is not placed and cannot be placed beyond the pale of the phrase 'as an act done for the usual or customary domestic purposes'.

In interpreting the word 'domestic' in this phrase 'any act done for the usual or customary domestic purposes', Mr. R. Vaidyanatha Iyer relied on *Smith* v. *Muller*[1], wherein the phrase 'used exclusively for deomestic purposes' is interpreted

1. (1894) 1 Q.B. 192.

as to cover a boiler used to heat offices or business premises upon which the owner does not reside, and also to supply water for the purpose of cleaning the offices and for the house-hold purposes of a resident caretaker, falling within the exception in section 4 of the Boiler Explosions Act, 1882. In support of this proposition, the Counsel for the petitioner cited the ruling the *Harrogate Corporation* v. *Mackay*[1], wherein it is held that water supplied to and used by a medical man for washing a motor car and for other purposes in connection therewith, the motor being used by him for the purposes of his profession or business of a physician and surgeon, is water supplied for domestic purposes within the meaning of section 12 of the Waterworks Clauses Act, 1863.

Reliance is then placed on the decision of the House of Lords in *Metropolitan Water Board v. Avery*,[2] where Lord Dunedin, in interpreting the expression ' domestic purposes ' found in the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. Cl. *xxi*.), observed :

> " On the other hand, the test of the quality of the use in itself—so tersely put by Buckley, L.J., " The test is not whther the water is consumed or used in the course of the trade, but whether the user of the water is in its nature domestic"—is not only easy of application but is automatic in checking abuse. For purposes truly domestic cannot be amplified, and when the consumption on such heads is large it is invariably attended by an increase in the rating value of the premises which brings with it an increased water rate ".

The second error into which the learned Magistrate has fallen is that normally the border of the Estate is the venue for erecting sheds. It may be ; but it need not always be so. The mere probability of erecting the shed on the borders of the Estate does not render the evidence of D.Ws. 1 and 2 as untruthful. I accept the evidence of D.Ws. 1 and 2. and find that no offence has been proved against the accused.

The revision petition is allowed. The petitioner is acquitted. Fine, if paid by him, shall be refunded.

V.M.K. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

The Vanguard Insurance Co., Ltd., Madras .. *Appellant**

v.

Chinnammal and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), *section* 95 (1) (b), *Proviso* (ii)—*Scope*—" *Contract of employment* "—*Meaning of.*

Though on a superficial view of section 95 of the Motor Vehicles Act it might appear that the words " contract of employment " found in that section would cover only a contract of employment with the owner of the insured vehicle, there is a preponderance of authority in favour of the other view that it would cover not only such persons but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. What is necessary is that for sufficient practical or business reasons, the person must be on the vehicle in pursuance of a contract of employment. If he is such a person, any injury caused to him would also be covered by the section.

Appeal against the order of the Motor Accidents Claims Tribunal, (District Judge), Tiruchirapalli in M.A.C.T.O.P.No. 28 of 1964.

N. Venkatarama Ayyar, for Appellant.

P. Anantakrishna Nair, for Respondents.

1. (1907) 2 K.B. 611.
2. L.R. (1914) A.C. 181 at 124.

* A.A.O. No. 182 of 1966. 6th December, 1968.

The Court delivered the following

JUDGMENT :—This appeal is against the judgment of the Motor Accidents Claims Tribunal, Tiruchirapalli, awarding compensation to the dependants of the deceased Murugan. He was travelling in a lorry belonging to the insured and insured by the appellant insurer. The Tribunal has found that Murugan died as a result of the rash and negligent driving of the insured vehicle by the employee of the insured. On behalf of the insurer which was added as a party to the proceedings before the Tribunal, two objections were taken. One was that the insurance policy did not cover a case of this kind, that it was intended to cover any accident or injury caused to an employee of the insured and not to the employee of any other person, that as in this case the deceased Murugan was the employee not of the insured, but of the person whose goods were carried in the insured vehicle, the policy does not cover the liability for an accident caused to Murugan. The second contention was that the insured vehicle was being driven contrary to the conditions of the permit relating to that vehicle and therefore the insurer was not liable. As regards the second objection, the Tribunal has pointed out that there is nothing on evidence to show that the insured vehicle was being used contrary to the conditions of the permit relating to the insured vehicle. The mere fact that the insured had issued a notice to the owner of the vehicle to produce the permit and that it was not so produced cannot be held to establish that the permit, if produced, would show that the vehicle was not to be used in places like the one where the accident occurred. In addition the Tribunal has also pointed out that the form prescribed for a public carrier permit found at page 172 of the Madras Road Traffic Code, 1940, Volume II, mentions that a public carrier permit can be given either for specified routes or specified areas and the driver of the vehicle says that the entire State of Madras is the area for which public carrier permit has been granted to the vehicle. Therefore, the Tribunal was undoubtedly right in holding that there is no substance in the second contention of the insurance company.

As regards the first contention, I must refer to a decision of a Full Bench of the Punjab High Court in *Oriental Fire & General Insurance Co. Ltd.* v. *Gurdev Kaur and others*[1], The Bench referring to the decision in *Izzard* v. *Universal Insurance Co., Ltd.*[2], has pointed out that the contention that the contract of employment should be construed in the Act as subject to the implied limitation that it should be with the person insured by the policy cannot be accepted and that such a departure from the clear language used cannot be justified; that the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are on the vehicle as the adequate criterion of such reasons; and there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. The Bench also referred to similar decisions of a Bench of the same Court in *Parkash Vati* v. *The Delhi Dayalbagh Diary Ltd.*[3], as well as of the Madhya Pradesh High Court in page 65 of the same volume and in *K. N. P. Patel* v. *K. L. Kesar*[4]. Thus, though on a superficial view of the section it might appear that the words "contract of employment" found in section 95 of the Motor Vehicles Act would cover only a contract of employment with the owner of the insured vehicle, there is a preponderance of authority in favour of the other view that it would cover not only such persons but also persons who are on the vehicle in pursuance of a contract of employment with the owner of the goods carried in it. What is necessary is that for sufficient practical or business reasons, the person must be the person on the vehicle in pursuance of a contract of employment. If he is such a person, any injury caused to him would also be covered by the section.

The appeal is, therefore, dismissed as without substance. The appellant will pay the costs of the respondents.

V.K. —— *Appeal dismissed.*

1. (1967) A.C.J. 158.
2. L.R. (1937) A.C. 773.
3. (1967) A.C.J. 82.
4. (1966) A.C.J. 284.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE M. NATESAN.

Dharmambal Achi .. *Petitioner**

v.

The Authorised Officer, Land Reforms, Nagapatinam and another .. *Respondents*.

Madras Land Reforms (Fixation of Ceiling on Land) Act (LVIII of 1961)—*Constitutional validity*.

The contention that in the light of *Golak Nath* v. *State of Punjab*, (1967) 2 S.C.J. 486 : A.I.R. 1967 S.C. 1643, the decision in *Krishna Raju Reddiar* v. *Authorised Officer*, I.L.R. (1967) 3 Mad. 109 : (1967) 1 M.L.J. 179, which upheld the validity of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961 should be reconsidered is untenable.

The majority in *Golak Nath* v. *State of Punjab*, (1967) 2 S.C.J. 486: A.I.R. 1967 S.C. 1643, by applying the doctrine of 'prospective overruling' upheld the validity of the Seventheenth Amendment, validity being rested on the basis of the earlier view of the Supreme Court as to the scope of Articles 13 (2) and 363 of the Constitution. The decision in *Krishnaraju Reddiar* v. *Authorised Officer*, I.L.R. (1967) 3 Mad. 109 : (1967) 1 M.L.J. 179, as to the validation of the Madras Act by the Seventeenth Amendment being rested on *Sankari Prasad Singh* v. *Union of India*, (1951) S.C.J. 775: A.I.R. 1951 S.C. 458. and *Sajjan Singh* v. *State of Rajasthan*, A.I.R. 1965 S.C. 845: (1965) 1 S.C.J. 377 does not call for reconsideration because of their prospective overruling only by *Golak Nath* v. *State of Punjab*, (1967) 2 S.C.J. 486: A.I.R. 1967 S.C. 1643.

Though in a sense the Seventeenth Amendment can be said to have revived and validated the Madras Act after it had been struck down by *Krishnaswami* v. *State of Madras*, (1965) 1 S.C.J. 239: A.I.R. 1964 S.C. 1515 that result is not brought about by the Parliament assuming powers not belonging to it but to the State Legislature. The revival and validation of the Madras Act by the Seventeenth Amendment are not a species of State legislation arrogated by the Parliament to itself but have been brought about by the deeming process employed by Article 31-B without in any way trenching on the State Legislature's power.

Petition under Articles 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the Gazette Notification G.O.Ms. No. 2931; Revenue, dated 30th September, 1966 and published in the *Fort St. George Gazette* dated 5th October, 1966, under the Madras Act LVIII of 1961 and to quash the same.

V. Vedantachari and *T. Rangaswami Iyengar*, for Petitioner.

The Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The main contention for the petitioner is that in the light of *Golak Nath* v. *State of Punjab*[1], we should reconsider *Krishnaraju Reddiar* v. *Authorised Officer*,[2] which upheld the validity of the Madras Land Reforms (Fixation of Ceiling on Land) Act, 1961. The Act was struck down by *Krishnaswami* v. *State of Madras*,[3]

*W.P. No. 1121 of 1967. 24th January, 1969.

1. (1967) 2 S.C.J. 486 : A.I.R. 1967 S.C. 1643.
2. (1967) 1 M.L.J. 179 : I.L.R. (1967) 3 Mad. 109.
3. (1965) 1 S.C.J. 239 : (1965) 1 An.W.R. (S.C.) 14 : (1965) 1 M.L.J. (S.C.) 14 : A.I.R. 1964 S.C. 1515.

as violative of the fundamental rights. That was on 9th March, 1964, but the Parliament on 20th June, 1964, enacted the Constitution (Seventeenth Amendment) Act, 1964 which included the Act in the Ninth Schedule to the Constitution. The validity of the Seventeenth Amendment was unsuccessfully questioned before the Supreme Court in *Sajjan Singh* v. *State of Rajasthan*[1]. It was there held by the majority opinion that Article 13 (2) did not affect the Amendment of the Constitution made under Article 368 and that the power to amend the Constitution conferred by Article 368 included even power to take away fundamental rights under Part III. In *Krishnaraju Reddiar* v. *Authorised Officer*[2], we held that the Madras Act was not incompetent for want of legislative power, and rejected the ground that Act, having been struck down as invalid by the Supreme Court in *Krishnaswami* v. *State of Madras*[3], it was *non est* and was void *ab initio* and Article 31-B did not help to validate it without a separate validating Act passed by the Madras Legislature. While recognising the principle in *Deep Chand* v. *State of Uttar Pradesh*[4], that an after acquired power cannot, *ex proprio vigore* validate a statute void when enacted, we held that it was, however, open to the constituent power, which is supreme, to expressly validate a law hit by Article 13 (2) of the Constitution by removing the prohibition specifically with reference to such law. We said:

> " If a law in the teeth of a constitutional prohibition is invalid from its inception, we can see no valid objection to the constituent power lifting the prohibition retrospectively and providing that the law should not be deemed to be void by reason of the prohibition thereby reviving and validating the law right through."

We pointed out that was what Article 31-B did which in terms provides that none of the Acts and Regulations specified in the Ninth Schedule should be deemed to be void or ever to have become void on the ground that such Acts and Regulations are inconsistent with or take away or abridge any of the rights conferred by any provisions of Part III. It may be seen that our view in *Krishnaraju Reddiar* v. *Authorised Officer*[2], proceeded on the assumption that *Sajjan Singh* v. *State of Rajasthan*[1], as to the scope of Article 13 (2) and 368 held the field. But that and the earlier cases in *Shankari Prasad Singh* v. *Union of India*[5], have been held by the majority in *Golak Nath* v. *State of Punjab*[6], to have been wrongly decided. According to the majority view in *Golak Nath* v. *State of Punjab*[6], the power of the Parliament to amend the Constitution is derived from Articles 245, 246 and 248 of the Constitution and not from Article 368 which only contains the procedure; amendment to the Constitution is but a legislative process and is a law within the meaning of Article 13 and if it takes away or abridges the rights conferred by Part III, it is void. Since the Parliament has, therefore, no power to amend Part III of the Constitution, so as to take away or abridge the fundamental rights, the Constitution (First Amendment) Act, 1951, the Constitution (Fourth Amendment) Act, 1955 and the Constitution (Seventeenth Amendment) Act, 1964, would be void, but on the basis of the earlier decisions of the Supreme Court and invoking and applying the doctrine of prospective overruling, it upheld these Acts to be valid.

The facts in this petition are of the same pattern as in *Krishnaraju Reddiar* v. *Authorised Officer*[1]. In that case we have fully set out the provisions of the Madras Act, their intendment and effect as well as the background of the legislation with the relative decided cases and they do not, therefore, require reiteration. The petitioner is a ryotwari proprietor owning lands in two villages, Meenammanallur and Isanur in Nagapattinam taluk and Melakottakam in Mannargudi taluk. As on 6th April, 1960, her holding totalled 104 acres and 7 cents out of which 99 cents

1. (1965) 1 M.L.J. (S.C.) 57: (1965) 1 S.C.J. 377: (1965) 1 An.W.R. (S.C.) 57 : (1965) 1 S.C.R 933 : A.I.R. 1965 S.C. 845.
2. I.L.R. (1967) 3 Mad. 109: (1967) 1 M.L.J. 179.
3. (1965) 1 S.C.J. 239 : A.I.R. 1964 S.C. 1515.
4. (1959) S.C.J. 1069 : A.I.R. 1959 S.C. 648.
5. (1951) S.C.J. 775 : (1951) 2 M.L.J. 683 : A.I.R. 1951 S.C. 458.
6. (1967) 2 S.C.J. 486 : A.I.R. 1967 S.C. 1643.

were exempt under section 73 and 42 acres and 63 cents were within the ceiling. The surplus 60 acres and 45 cents equivalent to 36 standard acres and 91 cents was notified under section 18 (1) and there was a proclamation under section 18 (2) (*a*) of the Act issued on 29th December, 1966, which was published as prescribed. The petition is to quash the notification under section 18 (1).

Sri Vedantachari for the petitioner argues that when there is no constituent power to amend the Constitution and constitutional amendment is itself but a law within the ambit of Article 13 (2) of the Constitution, the Seventeenth Amendment cannot validly revive and validate the Madras Act which had been struck down as still born by *Krishnaswami* v. *State of Madras*[1], as the power to revive it exclusively belongs to the State Legislature as a legislative function. Before we proceed to deal with it, we may reiterate that in *Krishnaraju Reddiar* v. *Authorised Officer*[2], we did not accept the contention that the Madras Act was incompetent for want of legislative power. *Krishnaswami* v. *State of Madras*[1], struck it down only on the ground that it violated Part III of the Constitution. The protection afforded by Article 31-B to the Act is limited to such violation and is not against any other ground. If the impugned State legislation lacks legislative competence otherwise than with reference to the fundamental rights, the Seventeenth Amendment does not and cannot save it. While dealing with the challenge against the Bihar Land Reform Act, 1950, Patanjali Sastri, C.J., in *State of Bihar* v. *Kameswar Singh*[3], observed:

> " It will be noted, however, that Article 31-A and 31-B afford only limited protection against one ground of chal'enge, namely, that the law in question is inconsistent with, or takes away or abridges any of the rights conferred by any provisions of this part. This is made further clear by the opening words of Article 31-A 'notwithstanding anything in the forgoing provisions of this part.' The Amendment Act (First Amendment) thus provides no immunity from attacks based on the lack of legislative competence under Article 245 read with the entries in List II or List III of the Seventh Schedule to the Constitution to enact the three impugned statutes as the Amendment Act did not in any way affect the lists."

What Sri Vedantachari says is that the Parliament is not competent to revive and validate an invalid State legislation. We do not think that this proposition can be disputed and the Supreme Court said in *Jaora Sugar Mills* v. *State of Madhya Pradesh*[4],

> " If it is shown that the impugned Act purports to do nothing more than validate the invalid State statutes, then of course, such a validating Act would be outside the legislative competence of Parliament itself."

The position will be *a fortiorari* where the State Legislature lacks competency with reference to the relevant lists and the Parliament in exercise of its own power makes a law attempting to rectify the defect. The Parliament cannot validate the State Acts which are void for lack of legislative power.

But in our view, the foregoing considerations do not affect the validity of the Madras Land Reforms (Fixation of Ceiling on land) Act, 1961. We are inclined to that view for two reasons. The majority decision in *Golak Nath* v. *State of Punjab*[5], has only prospective operation and has upheld the validity of the Seventeenth Amendment on the limitated application of the principle of *stare decisis* and on the basis of its earlier decisions, namely. *Shankari Prasad Singh* v. *Union of India*[6], and *Sajjan Singh* v. *State of Rajasthan*[7]. This can only be on the footing that the two

1. (1965) 1 S.C.J. 239 : A.I.R. 1964 S.C. 1515.
2. I.L.R. (1967) 3 Mad. 109 : (1967) 1 M.L.J. 179.
3. (1952) S C.J 354: A I.R 1952 S C 252.
4. (1967) 1 S.C J. 98: A.I.R. 1966 S.C. 416.
5. (1967) 2 S.C.J. 486 : A.I.R. 1967 S C. 1643.
6. (1951) S.C.J. 775 : A.I.R. 1951 S.C. 458.
7. (1965) 1 M.L.J. (S.C.) 57 : (1965) 1 S.C.J. 377 : (1965) 1 An.W.R. (S.C.) 57 : A.I.R. 1965 S.C. 845.

decisions, should hold the field in respect of legislative enactments including the Seventeenth Amendment made prior to 27th February, 1967, when *Golak Nath* v. *State of Punjab*[1], was decided. In *State of Maharashtra* v. *Madhavarao Damodar Patil and others*[2], the contention, *inter alia*, was that Seventeenth Amendment, in spite of the decision of the Supreme Court in *Golak Nath* v. *State of Punjab*,[1] was invalid and it was disposed of by the Supreme Court by the following observations:

> " Coming to the second point, the learned Counsel merely mentions the point. He says that there was no majority for any particular ratio as five Judges held the Seventeenth Amendment to be void because it contravened Art. 13 (2), but by applying to doctrine of ' prospective overruling ' they declared that their decision would not affect the validity of the Seventeenth Amendment. Hidayatullah, J., as he then was, on the other hand, did not apply the doctrine of ' prospective overruling,' but held section 3 (2) of the Seventeenth Amendment to be bad. The other five Judges held that the Seventeenth Amendment was a valid amendment of the Constitution. We are, however, bound by the result arrived at by this Court in that decision and the result that the Seventeenth Amendment is valid is binding on us."

The point is that the majority in *Golak Nath* v. *State of Punjab*[1], by applying the doctrine of ' prospective overruling ' upheld the validity of the Seventeenth Amendment, the validity being rested on the basis of the earlier view of the Supreme Court in the two decisions as to the scope of Articles 13 (2) and 368 of the Constitution. Our view in *Krishnaraju Reddiar* v. *Authorised Officer*[3], as to the validation of the Madras Act by the Seventeenth Amendment being rested on *Sankari Prasad Singh* v. *Union of India*,[4], and *Sajjan Singh* v. *State of Rajasthan*[5], does not call for reconsideration because of their prospective overruling only by *Golak Nath* v. *State of Punjab*[1].

The second reason is this. Though in a sense the Seventeenth Amendment can be said to have revived and validated the Madras Act after it had been struck down by *Krishnaswami* v. *State of Madras*[6], that result is not brought about by the Parliament assuming powers not belonging to it but the State Legislature. The revival and validation of the Madras Act by the Seventeenth Amendment are not in our view, a species of State Legislation arrogated by the Parliament to itself but have been brought about by the deeming process employed by Article 31-B without in any way trenching on the State Legislature's power. The invalidity of the Madras Act as found in *Krishnaswami* v. *State of Madras*[6], resulted from the operation of Article 13 (2) and in effect what Article 31-B says is that Article 13 (2) with reference to the State Act in question never applied to it. If this position is fixed in mind as a fact, and it is not allowed to boggle, there will then be no room for the argument based on the Act being still-born on account of its violation of the fundamental rights and its revival and revalidation.

The petition is dismissed with costs. Counsel's fee Rs. 100.

V.K. *Petition dismissed.*

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1. (1967) 2 S.C.J. 486 : A.I.R. 1967 S.C. 1643.
2. (1969) 2 S.C.J. 81 : A.I.R. 1968 S.C. 1396.
3. I.L.R. (1967) 3 Mad. 109 : (1951) 1 M.L.J. 179.
4. (1951) S.C.J. 775 : (1951) 2 M.L.J. 683 : A.I.R. 1951 S.C. 458.
5. (1965) 1 M.L.J. S.C. 57 : (1965) 1 S.C.J. 377 : (1965) 1 An.W.R. (S.C.) 57 : A.I.R. 1965 S.C. 845.
6. (1965) 1 S.C.J. 239 : A.I.R. 1964 S.C. 1515.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. K. VEERASWAMI, *Chief Justice.*

Messrs. Black Sea State Steamship Line, represented by its Agents D. M. Madan & Co. .. *Petitioner**

v.

The Minerals and Meta's Trading Corporation of India Ltd. .. *Respondent.*

Contract Act (IX of 1872), section 28—Stipulation as to the choice of tribunal for adjudication of disputes—Choice of foreign tribunal—If absolutely binding—Discretion of Court.

It is no doubt true that it is open to the parties to a contract to agree among themselves that the disputes relating to the same will be subject to the jurisdiction of Courts in particular territory to the exclusion of other Courts and the parties who make their choice of the tribunal will normally be bound by their contract.

But the enforcement of such a contract by Courts in India is not imperative where the choice restricts them to a foreign Court.

In cases of foreign jurisdiction clause the question is not so much of freedom of contract and the parties being bound by their choice as of expediency in the light of what may be called the rule of balance of convenience and the ends of justice in the particular circumstances of the case.

Cheshire : Private International Law (6th edn.) page 222, referred.

The Fehmarn, (1958) 1 W.L.R. 159; *Mackender* v. *Feldia A.G.*, (1967) 2 W.L.R. 119, referred and explained.

Where the Bill of Lading clearly provided that all disputes arising under and in connection with the same shall be judged in U.S.S.R. and according to the Merchant Shipping Code of the U.S.S.R. and the plaintiff sued the agents of the Shipping company at Madras for short delivery held, though the clause in the Bill of lading restricting the forum might be valid, still having regard to the fact that the claim was small and the shipping company had its agents at Madras and there was no difficulty in collecting the necessary facts and the law applicable, the Courts in Madras will have jurisdiction to try the case.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of Small Causes, Madras dated 25th January, 1968, and made in N.T.A.No. 143 of 1967 against S.C.S. No. 3350 of 1966.

S. K. Ramachandran and *S. M. Ali Mohamed*, for Petitioner.

G. Narayanan and *K. V. Prakash*, for Respondent.

The Court delivered the following

JUDGMENT.—In view of the foreign jurisdiction clause contained in a bill of lading, the petitioner, a Russian Steamship concern, objected to the jurisdiction of the Court of Small Causes at Madras to try the suit brought by the respondent for damages for short delivery. That Court, however, in the first instance by one of its Judges overruled the preliminary objection and with this conclusion, the New trial Judges, functioning under the procedure provided under the provisions of the Presidency Small Cause Courts Act, concurred. The defendant canvasses the correctness of the view.

I have no doubt that, on the facts of this case, the only conclusion the Courts below could rightly arrive at, in the circumstances, is the one which they did. The contract to carry a considerable number of electrolytic zinc ingots from Odessa to Madras Port was entered into in Russia in June, 1965. When the goods arrived at this end by Mozdock in July, they were found to be short of their number shipped,

*C.R.P. No. 495 of 1968. 20th June, 1969.

with the result the respondent instituted the suit on the small cause side for recovery of Rs. 358.13 inclusive of the loss of the proportionate transit and customs charges. The bill of lading was a printed document which, among other things, contained on the front page a clause " The shipper, the receiver of goods and the holder of the bill of lading as well as any other person interested hereby expressly accept and agree to all printed written or stamped provisions, terms and reserves of this bill of lading, including those on the back hereof." On the back of the document there were two stipulations:

> " 26. All claims and disputes arising under and in connection with this bill of lading shall be judged in the U.S.S.R.
>
> 27. All questions and disputes not mentioned in this bill of lading shall be determined according to the Merchant Shipping Code of the U.S.S.R."

So, it is clear that the parties entered into a binding contract as between them that the Russian Courts should adjudicate the disputes arising under and in connection with the bill of lading and that the questions and disputes not mentioned in the bill of lading should be determined according to the Merchant Shipping Code of the U.S.S.R. At the moment this Court is not so much concerned with the law that should govern the contract but with the jurisdiction of the Small Cause Court at Madras.

It is strongly urged that the clear stipulations in the bill of lading, which amount to a contract between the parties and which require all claims and disputes arising under and in connection with the bill of lading to be adjudicated in the U.S.S.R., should be respected and the parties by their own choice should be directed to adhere to that. Attention is also invited to section 28 of the Indian Contract Act to say that the Contract is not hit at by it. That is of course correct, for, the parties thereby were not (sic) restricted absolutely from enforcing their rights under or in respect of the contract by the usual legal proceedings in the ordinary tribunals. On the question of the jurisdiction of the Small Cause Court, however, I think the circumstances of this case do not warrant driving the plaintiff to resort to the Russian Courts.

The parties who make their choice of the Tribunal should normally be bound by their contract. That should especially be the case as to the choice of the law applicable to the contract. But it seems to me that enforcement by the Indian Courts of the choice of a foreign tribunal cannot be ruled as imperative; but it should depend on the balance of convenience in particular circumstances and the exigencies of justice. The law has been fairly accurately stated by Cheshire in his Private International law, 6th edition, page 222:

> " As distinct from the express or implied choice of the proper law, the express choice of a foreign tribunal is not absolutely binding. In accordance with the excellent principle that a contractual undertaking should be honoured, there is indeed, a *prima facie* rule that an action brought in England in defiance of an agreement to submit to arbitration abroad will be stayed *The Cap Blanco*,[1] *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society Ltd*[2]. but nevertheless the Court has a discretion in the matter and where the parties are amenable to the jurisdiction, as for example, where the defendant is present in England, it will allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country (*The Athenee*[3], *The Fehmarn*[4]."

In a case of foreign jurisdiction clause, the question is not so much of freedom of contract and the parties being bound by their choice as of expediency in the light of what may be called the rule of balance of convenience and the ends of justice in the case on hand. Referring to the *The Athenee*[3], *The Fehmarn*[4], Cheshire seems to apprehend that unless the discretion of the Court in favour of

1. (1913) P. 130.
2. L.R. (1903) 1 K.B. 249.
3. (1922) 11 Ll.R. 6.
4. (1958) 1 W.L.R. 159.

allowing the English action to continue is exercised sparingly, there is a danger that foreign merchants will lose faith in the efficacy of arbitration clauses. It may be that, according to Cheshire, that case went to the verge of the law. While Courts are certainly expected to use their discretion judicially and on proper grounds keeping in view the balance of convenience and the ends of justice, the exercise cannot be guided by the prospect of the danger apprehended by Cheshire. The consideration is more from the stand point of justice than to ignore the necessity to hold the parties to the contract as to the forum for adjudication.

The Fehmarn case[1], is nearer to this case, for, it was concerned with a foreign jurisdiction clause identical to what appears in this case. It applied the rule of ends of justice to sustain an English action notwithstanding the foreign jurisdiction clause binding between the parties to the dispute. The view was also based on the balance of convenience. The Court of Appeal in *Mackender* v. *Feldia A.G.*,[2], declined the English jurisdiction. But in doing so it was obviously led by the peculiar facts of the case. The defendant there had already started proceedings in accordance with the foreign jurisdiction clause which did not appear to be unjust or inconvenient to the parties and the stakes involved were considerable unlike in this case. Lord Denning, M.R., however, recognised :

> " But although there is jurisdiction to give leave, it is a matter of discretion as to whether it should be granted."

He also says later on in his judgment:

> " The foreign jurisdiction clause is a positive agreement by the underwriters that policy is governed exclusively by the Belgian law. Any dispute under it is to be exclusively subject to Belgian jurisdiction. That clause still stands and is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction."

This observation taken by itself may possibly give the impression that his decision was solely rested on it. But obviously the observation was made in the course of repelling an argument that certain nondisclosure on the part of the assured struck out the whole contract. I should think rather that the decision of the Master of Rolls was induced not solely by the consideration of giving respect to the contract entered into by the parties but also the other circumstances, particularly the pendency of the defendants suit in the Belgian Court and also the fact that a large stake was involved in the dispute.

It did not also appear that there were circumstances which would make it unfair or inconvenient to the plaintiffs in England to face the Belgian Court. Diplock, L.J., in dealing with the question whether an agreement which would be illegal under the English law is void under the contract, observed.

> " The *prima facie* rule of English conflict of laws more liberal in this respect than many Continental systems is that the proper law of a contract is that system of law which the parties themselves agreed shall regulate the legally enforcable rights and duties to which their agreement gives rise."

But having said that, he went on to say :

> " The Belgian Courts are not only a convenient forum for its resolution; they are the forum to which both parties agreed to submit."

That gives the basis of his decision. In my view *Mackender* v. *Feldia, A.G.*[2], is not against the proposition that local enforcement of a foreign jurisdiction clause is discretionary. The Court of Appeal in that case definitely found the Belgian Courts were the convenient forums for the parties. Reference was made before me to *M/s. L. T. Societies* v. *M/s. Lakshminarayan*[3], *Lakshminarayanan* v. *G. G. D.' Esportazions*[4], and *N. G. Insurance Co. of India* v. *A. S. A. Kempagni*[5], but each of them

1. (1958) 1 W.L.R. 159.
2. (1967) 2 W.L.R. 119.
3. A.I.R. 1959 Cal. 669.
4. A.I.R. 1960 Cal. 545.
5. A.I.R. 1964 Bom. 71.

was decided on its facts relating to the balance of convenience and ends of justice. These cases have all kept in view that proposition in approaching the particular circumstances and in giving effect to or not the foreign jurisdiction clause.

In the instant case, I have no hesitation in taking the view that the balance of convenience as well as the ends of justice tend towards sustaining the jurisdiction of the Court of Small Causes to entertain and dispose of the suit. The claim is so small that it would be unrealistic and unfair to drive the respondent to resort to the Russian Courts. The New trial judges have narrated that the petitioner has their local accredited agents in Madras. Further there seems to be no insuperable difficulty in collecting the necessary facts and the law applicable to enable the disposal of the suit at Madras.

The petition is dismissed with costs.

R.M.

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE A. ALAGIRISWAMI.

Prof. A. Sankaranarayanan .. *Petitioner**

v.

The University of Madras by vice-Chancellor and another .. *Respondents.*

Madras University Act (VII of 1923), *sections* 16 *and* 29 *as amended by the Madras University (Amendment) Act,* 1966—*Madurai University Act and Statutes of the Madras University, Chapter* 19, *section* 10 *and new statute* 11—*Interpretation—Register of graduates containing names of persons residing in the University area for five years only and not for life—No express power to frame statutes retrospectively—Power to frame restrospective statutes if could be implied.*

The petitioner, a resident of Madurai and a graduate of the Madras University was elected as a member of the Senate by the Registered Graduates in the election held in 1964. In 1966, the University of Madurai came into existence with jurisdiction over the Districts of Madurai, Ramanathapuram, Tirunelveli and Kanyakumari. Under old section 10 of Chapter 19 of the statutes of Madras University, the petitioner was entitled to have his name in the register of graduates of the Madras University for life. Under sub-rule (3) of the new section 11 (*a*) graduate seeking enrolment should be ordinarily resident within the University area, *i.e.*, within the State of Madras except the Districts of Madurai, Ramanathapuram, Tirunelveli and Kanyakumari. Could a writ of *mandamus* be issued directing the Madras University to forbear from removing his name from the register of graduates in the Madras University or in the alternative to restore the same in the register of graduates?

Held : While the Senate may be the Legislature of the University it is not a Legislature as normally understood. The power of the Senate of the Madras University to frame statutes under sections 16 and 29 of the Madras University Act, 1923, is analogous to the rule-making power conferred on the executive in various statutes to frame rules and regulations in furtherance of the objects of the statutes under which they are framed. Such power to make rules and regulations, is quite often given under specific heads. But sometimes it is generally given without referring in particular to any of the purposes for which such rules and regulations may be framed. But that does not mean that in framing such rules and regulations retrospective effect can be given.

But a power to frame laws retrospectively need not necessarily be express. It could even be implied. From a reading of the Madras University (Amendment) Act, 1966, in conjunction with the Madurai University Act, it is clear that the

* W.P. No. 599 of 1967. 15th July, 1969.

intention of the Legislature was that a new register of graduates was to be prepared by the Madras University as well as by the Madurai University, that the register was to consist of graduates residing within the Madras University area, that the register was not to consist of persons whose names were not to be for life, but only for five years, and that the new register of graduates, was to contain the names of graudates of any University whatsoever provided they were resident within the areas of the respective Universities. The old state of the law and the intention behind the amendment carried out by the Legislature being thus clear there is no difficulty in holding that even if the substitution of the old chapter 19 and old statute 10 of the statutes of the Madras University by the new chapter 19, and new statute 11, were in the nature of retrospective subordinate legislation, it is permitted by implication of the new legislation.

Petition under Aritcle 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of *Mandamus* forbearing the respondents from removing the Petitioner's name from the register of graduates in the Madras University or in the alternative to restore the same in the register of graduates.

G. Ramaswamy, for Petitioner.

V. K. Tiruvenkatachari for *C. N. S. Chengalvarayan*, for 1st Respondent.

The Government Pleader, for 2nd Respondent

The Court made the following

ORDER.—Till 1966, the Madras University had jurisdiction over the whole of the State of Madras. In that year the University of Madurai came into existence with jurisdiction over the District of Madurai, Ramanathapuram, Tirunelveli and Kanyakumari. I shall hereafter refer to this area as the Madurai University area and the rest as the Madras University area. Consequent on the exclusion of a portion of the area which was formerely within the jursidiction of the Madras University, certain amendments were made in the Madras University Act. It is the consequence of those amendments that has given rise to this Writ Petition.

Under section 16 of the Madras University Act 1923 the Senate, which is the supreme governing body, has power to make statutes and amend or repeal the same. Under section 29 of the Act the statutes may provide among other matters for the maintenance of a register of registered graduates. "Registered graduates", had been originally defined under clause (*h*) of section 2 as graduates registered under the Act or the Indian Universities Act, 1904. This clause was amended in 1966 to read, "Registered Graduate" means a graduate registered under this Act. In pursuance of this power, the Senate had made a number of statutes. Chapter 19 of those statutes deals with elections to the authorities of the University. Part C of that Chapter deals with elections conducted by the University and section 10 (1) of that part provides that the syndicate shall maintain a Register in which any graduate of the University who became eligible for a degree in any faculty shall be entitled to have his name entered and retained subject to certain provisions and it also provides that the graduate concerned shall apply in the prescribed form to the Registrar and pay a consolidated fee of rupees five, which will entitle him to have his name entered and retained in the register for life. After the passing of the Madras University Amendment Act, 1966, consequent on the constitution of the Madurai University, the whole of Chapter 19 above referred to was substituted by a new chapter and a new section 11 took the place of the old section 10.

It provides that the Registrar shall maintain a register on which any graduate of any statutory University in the territory of India who has been a graduate for at least three years and of any University in the territory of India shall be entitled to have his name entered and retained for a period of five years, subject to the condition that in either case he has been ordinarily resident in the Madras University area. Sub-rule 3 of that rule provides that a Graduate seeking enrolment should be ordinarily resident within the University area, *i.e.*, within the State of Madras except

the Districts of Madurai, Ramanathapuram, Tirunelveli and Kanyakumari. It will be noticed that while formerly only graduates of the Madras University were entitled to have their names entered in the register of graduates and to have their names retained in that register for life, the new rule provides that any graduate of any University can apply for and be included in the Register of graduates but that will be only for five years at a time. Even this is subject to the condition that they must reside within the Madras University area. In the previous rule there was no requirement that a Madras University graduate should necessarily be a resident in the Madras University area in order to enable him to be included in the register of graduates of the Madras University.

The petitioner is the principal and professor of Mathematics of a Tutorial College at Madurai. He is a graduate of the Madras University. He was elected as a member of the Senate by the registered graduates in the election held in 1964. The period of a member of the Senate so elected is normally three years. He alleges that he wanted to stand for the fresh election to the Senate and was told that his name was not in the electoral roll and he could not, therefore, stand for the election for the membership of the Senate. He has, therefore, filed this writ petition for a writ of *mandamus* directing the Madras University to forbear from removing his name from the register of graduates in the Madras University or in the alternative to restore the same in the register of grauduates.

The main, if not the sole function of the register of graduates is to constitute an electorate for the purpose of electing a proportion of the members of the Senate of the University. The petitioner's contention is that by the latest amendment of its statutes by the Madras University, he has been deprived of his right to continue on the register of graduates of the Madras University for life as also of his right to stand for election as a member of the Senate of the Madras University. It must be mentioned that in the Madurai University Act a provision was made similar to that introduced in the Madras University Act by the Madras University Amendment Act, 1966, providing for a register of graduates consisting of graduates of any University who may be resident within the Madurai University area. If the contentions of the petitioner that his name should be continued on the register of graduates of the Madurai University were to be accepted, it would mean that he would be entitled to have his name included in the register of graduates and to stand for election to the Senate from the Registered Graduates constituency of both Universities. On the other hand the graduates who may be resident in the Madras University area would not be entitled to have their names included in the register of graduates of the Madurai University or to stand for election to the Senate of the Madurai University. Of course, if the relevant statutory provisions produce such a result, they would have to be given effect to notwithstanding that it may confer an extra advantage on persons whose names were found in the old register of graduates of the Madras University.

The argument on behalf of the petitioner is as follows: Under old section 10 of Chapter 19 of the statutes of Madras University, the petitioner was entitled to have his name in the register of graduates of the Madras University for life. The new section 11 (which corresponds to the old section 10) takes away his vested right of having his name continued in that register and also his right to stand for elections to the Madras University. This amounts to retrospective legislation. The power of the Senate of the Madras University under section 16 read with section 29 of the Madras University Act to make statutes is a power of subordinate legislation. No subordinate legislation can have retrospective effect unless the statutory power under which such subordinate legislation is framed specifically enables retrospective effect being given to the subordinate legislation. There is no such power specifically found either in section 16 or in section 29 enabling the statutes being given retrospective effect. Therefore, it should be held that notwithstanding the provisions of new Chapter 19 of the statutes of the Madras University, the old register of graduates of the Madras University should be held to continue and the petitioner's name also should be held to continue on that register.

This contention is sought to be supported by a reference to Craies on Statute Law, 6th edition, page 386 where the following passage occurs:

"A statute is to be deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past."

At page 387 is found a reference to the Judgment in *Bardo* v. *Bingham*[1], where it is stated that the general rule of law undoubtedly being, that except there be a clear indication either from the subject-matter or from the wording of a statute, the statute is not to receive a retrospective construction.

In answer to this contention Mr. V. K. Thiruvenkatachari appearing for the Madras University contends that the power granted to the Senate of the Madras University to frame statutes under sections 16 and 29 of the Madras University Act is general, that it is not subject to any conditions, that the Legislature has given complete discretion to the Senate in respect of the framing of statutes and that it was open to the Senate to lay down any standard or criteria for the inclusion of any graduate or exclusion of any graduate from the register of graduates of the Madras University, and that the Senate which conferred such rights on the graduates, whose names it placed on its register of graduates could by the same token take away their names from the register and there is nothing to prevent it from doing so.

In *In the matter of G. A. Natesan* and *K. B. Ramanathan*[2], a Bench of this Court in relation to this very University stated the position with regard to the general scheme of the Act in the following terms:

"The general scheme of the Act and the regulations to be framed would appear to be this, that the Senate should be the legislative and the Syndicate the executive Government of the University, the powers of the Senate being subject, in certain matters, to the control of the Government, that the Senate should pass general rules in the form of regulations under section 25 of the Act of 1904 and that the Syndicate should deal with the administration of specific matters and the application of the regulations to them. It is, I think, further clearly involved that the syndicate should exercise its functions subject to and in conformity with the regulations and from that I think too it necessarily follows that a proceeding of the Syndicate which is contrary to the regulations would be invalid, and that the Syndicate cannot adopt measures or pass resolutions, or whatever else they may be termed which would be in conflict with or effect a modification of the existing regulations or bring about a result, such as by the Act is reserved to the Senate to effect by the passing of a regulation. This, as I say, seems to be a clear deduction from the general scheme of the Act".

Emphasis is placed on this statement of law wherein the Senate is referred to as the legislative Government of the University and it is contended that there are no restrictions on the powers of this Legislature, that the action of the Senate in substituting a new Chapter 19 in place of old Chapter 19 and a new section 11 in place of the old section 10 is merely the exercise by the University of this legislative power upon which there are no restrictions and in making the substitution above referred to the Senate was only exercising its legislative power and the right to continue on the register of graduates for life which was conferred on any graduates by the legislature of the University could be taken away by that very Legislature and such exercise of power cannot be questioned on the ground that it is subordinate legislation which has been given retrospective effect. I am afraid this argument cannot be accepted. While the Senate may be the Legislature of the University it is not a Legislature as normally understood and its powers are strictly limited by what is conferred on it by the statute. I consider that the power of the Senate of the Madras University to frame statutes under sections 16 and 29 of the Act is analogous to

1. (1870) L.R. 4 Ch. App. 735, 739.
2. (1917) I.L.R. 40 Mad. 125, 138 : 31 M.L.J. 634.

the rule making power conferred on the executive in various statutes to frame rules and regulations in furtherance of the objects of the statutes under to which they are framed. Such power to make rules and regulations, is quite often given under specific heads. But sometimes it is generally given without referring in particular to any of the purposes for which such rules and regulations may be framed. But that does not mean that in framing such rules and regulations retrospective effect can be given. I find it difficult to accept the argument that no retrospective effect has been given in this case or that the Senate was simply exercising legislative power. Under the old statutes of the Madras University, the registered graduates had the right to have their names continued in the register of graduates for life and, therefore, to stand for the elections of the University. There is no doubt that that right has been taken away by the new statutes. In framing the statutes, the Senate of the Madras University is only exercising the powers of making subordinate legislation and if the support for the validity of the new statutes is to be found only in the argument that the Senate is the Legislature of the University and its powers are unlimited and that it can take away the rights which it conferred by another legislative enactment subsequently the Madras University is bound to fail.

Mr. Thiruvenkatachari referred to Halsbury's Laws of England, Third Edition Volume 13, page 708, para. 1442 and page 714, para. 1452. The statement of law in para, 1442 is as follows:

> "The Constitution, functions, and privileges of Universities are governed by the terms of their instruments of foundation, or by Acts of Parliament. In so far as there can be said to be any general law relating to Universities or their Colleges, it belongs, strictly speaking either to the law of corporations or to that of charities. The statutes and instruments of foundation relating to individual Universities do in fact, however, result in producing characteristics capable to some extent of classification.
>
> A University usually consists of a Chancellor, a body of graduates, and students. Its Government is usually provided for by the creation of a council or senate, which acts as the executive and has an initiative in such legislation as the university is empowered to carry out, sometimes subject to the Queen in Council, sometime with the further assent of Parliament."

In the latter paragraph it is stated "the legislative body of the University of Cambridge is the Senate. The Council of the Senate offers to the Senate proposals for confirmation or rejection." I do not think that these two statements of law in Halsbury's Laws of England can help the respondent. I have already dealt with the argument that the Senate should be deemed to be the legislative body of the University. Even in regard to the statement of law found in paragraph 1442 referred to above, Mr. Thiruvenkatachari was not able to point out any case where a corporation was held capable of making subordinate legislations of a retrospective character.

From this point of view his reference to Schedule VII, List II, entry 32 of the Constitution of India, which clubs Universities and Corporations together cannot be of much help. I asked Mr. Thiruvenkatachari as well as the learned Government Pleader, who was appearing in support of the stand taken by the University, to point out any case where an authority making subordinate legislation is in pursuance of an authority conferred on it by a statute was held entitled to give retrospective effect to such subordinate legislation is in the absence of a specific power in the statute itself to do so. They were not able to point out any such instances.

Mr. Thiruvenkatachari referred to the decision of the Supreme Court in *In re The Delhi Laws Act* (1912)[1], where at pages 766 and 767, the Supreme Court dealt with the argument that the *doctrine delegata potestas non potest delegare* cannot apply to act ons of Legislatures and if these Legislatures delegate powers to some other authority to make rules or regulations or authorise the executive Government to enforce laws made by them or other Legislatures wholly or in part and with or without restric-

1. (1951) S.C.J. 527 : (1951) S.C.R. 747.

tions or modifications, the Legislatures are perfectly competent to do so. The learned Judges went on:

"When a legislative body passes an Act it has exercised its legislative function. The essentials of such function are the determination of the legislative policy and its formulation on as a rule of conduct. These essentials are the characteristics of a Legislature by itself. It has nothing to do with the principle of division of powers found in the constitution of the United States of America. Those essentials are preserved when the Legislature specifies the basic conclusions of fact, upon ascertainment of which, from relevant data, by a designated administrative agency, it ordains that its statutory command is to be effective. The Legislature having thus made its laws, it is clear that every detail for working it out and for carrying the enactments into operation and effect may be done by the Legislature or may be left to another Subordinate agency or to some executive officer. While this also is sometimes described as a delegation of legislative powers, in essence it is different from delegation of legislative power which means a determination of the legislative policy and formulation of the same as a rule of conduct. I find that the word 'delegation' is quite often used without bearing this fundamental distinction in mind. While the so-called delegation, which empowers the making of rules and regulations, has been recognised as ancillary to the power to define legislative policy and formulate the rule of conduct the important question raised by the Attorney-General is in respect of the right of the Legislature to delegate the legislative functions strictly so called."

Again at page 770 after referring to the case of *The Queen* v. *Bura*[1], Their Lordships quoted from the judgment of Markby, J., in that judgment which was to the following effect.

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself...........*If what has been done is legislation*, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited......it is not for any Court of justice to inquire further, or to enlarge constructively those conditions and restrictions."

As I already pointed out while the Senate may be the Legislature of the University, it is in no sense as legislature as ordinarily understood and it was not exercising legislative power in making the statutes but was only exercising the power of subordinate legislation which is referred to by their Lordships of the Supreme Court in the extract quoted earlier, wherein their Lordships pointed out that the legislature having made its law, it is clear that every detail for working it out and for carrying the enactments into operation and effect may be done by the Legislature or may be left to another subordinate agency or to some executive officer. It is in that sense the detail for working it out has been left to the subordinate agency, that agency in this case being Senate.

Mr. Thiruvenkatachari referred to the decision of the Supreme Court in *Rajnarain Singh* v. *The Chairman, Patna Administration Committee, Patna and another*[2], where at page 298, Bose, J., set out within a short compass the conclusions of the Supreme Court in the earlier cases but this does not in any way add to the strength of the arguments already noticed. Thus, the contention of Mr. Thiruvenkatachari that the Senate of the Madras University is a Legislature and that within the scope of its legislative power, it was competent to pass such legislation as it chose and, therefore, even though the new statutes framed by it might be retrospective in effect, it could be upheld, has to be rejected.

1. (1877-78) 5 I.A. 178.
2. (1954) S.C.J. 661 : (1954) 2 M.L.J. 344 : (1955) 1 S.C.R. 290.

Mr. Thiruvenkatachari then contended that the right of the petitioner to have his name continued on the register of graduates of the Madras University was not a right which has been taken away by the new statutes. He referred to the decision in *Director of Public Works* v. *Ho Po Sang*[1], where the Privy Council held that in the case before them the aggrieved party cannot be said to have a right under the repealed ordinance and he had no more than a hope that a certificate would be given. The present case cannot be equated to that case because the petitioner had his name in the register of graduates and if elections were held as they were bound to be held once in three years, he had a right to stand for election. The main purpose, if not the only purpose, is already indicated of the preparation of the register of graduates is to constitute an electorate which will elect a certain number of members to the Senate. Therefore, the petitioner did have a right which was taken away by the impugned statute.

I consider, however, that the validity of the new Chapter 19 and new statute 11 in that Chapter could be upheld on another ground. A power to frame laws retrospectively need not necessarily be express. It could even be implied. In Craies on Statute Law, 6th Edition at page 391 it is pointed out:

" If it is a necessary implication from the language employed that the Legislature intended a particular section to have a retrospective operation, the Courts will give it such an operation". " Baron Parke", said Lord Hatherley in *Pardo* v. *Bingham*,[2] did not consider it an invariable rule that a statute could not be retrospective unless so expressed in the very terms of the section which had to be construed, and said that the question in each case was whether the Legislature had sufficiently expressed that intention. In fact, we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former state of the law, and what it was that the Legislature contemplated."....In *Main* v. *Stark*[3], Lord Selborne said: "Their Lordships, of course, do not say that there might not be something in the context of an Act of Parliament, or to be collected from its language, which might give to words *prima facie* prospective a larger operation, but they ought not to receive a larger operation unless you find some reason for giving it........In all cases it is desirable to ascertain the intention of the Legislature. He went on : " Words not requiring a retrospective operation, so as to affect an existing statute prejudicially, ought not to be so construed"; but in *Reynolds* v. *Att-Gen. for Nova Scotia*[4], it was held that this rule did not extend to protect from the effect of a repeal a privilege which did not amount to an accrued right."

I think it is plain from a reading of the Madras University (Amendment) Act, 1966 in conjunction with the Madurai University Act that the intention of the legislature was that a new register of graduates was to be prepared by the Madras University as well as by the Madurai University, that the register of graduates of the Madras University was to consist of graduates residing within the Madras Univesity area that the register of graduates was to consist not of persons whose names were to be on it for life, but only for five years, and that the new register of graduates was to contain the names of graduates of any University whatsoever provided they were resident within the areas of the respective universities. The old state of the law and the intention behind the amendment carried out by the legislature being thus clear there is no difficulty in holding that even if the substitution of the old Chapter 19 and old statute 10 the statutes of the Madras University by the new Chapter 19 and new statute 11 were in the nature of retrospective subordinate legislation, it is permitted by implication of the new legislation.

Section 54-A (1) of the Madras University (Amendment) Act, 1966 provides as follows:

" Every person ordinarily resident in the State of Madras except the area comprising the revenue districts of Madurai, Ramanathapuram, Tirunelveli, and

1. (1961) A.C. 901.
2. (1870) L.R. 4 Ch. Appl. 735, 740.
3. (1890) 15 A C 384, 388
4. (1896) A.C. 240, 244.

Kanyakumari, who—(i) has been for atleast three years a graduate of any university in the territory of India ; or (ii) is a registered graduate of any University in the Territory of India, shall be entitled to have his name entered in the register of graduates maintained under this Act for a period of five years on payment of such fee and subject to such conditions as may be prescribed by the Statutes.

(2) All applications for registration under sub-sections (1) shall be sent to the Registrar together with the prescribed fee and such proof of qualifications as may be prescribed by the Statutes.

(3) The Registrar shall, on receipt of an application made under sub-section (2) and after making such enquiry as he deems fit, enter in the register of graduates the name of the applicant.

(4) Every person whose name has been entered in the register of graduates under sub-section (3) shall be entitled to have such entry renewed every five years on application made in that behalf to the Registrar within such time, in such manner and on payment of such fee as may be prescribed by the Statutes."

Section 56 of the same act is as follows :

"The Statutes, Ordinances and Regulations in force at the time of commencement of this Act shall continue to be in force until they are replaced by Statutes Ordinances or Regulations framed under the said Act as amended by this Act."

Thus, what has been done by the new statutes introduced by the Senate of the Madras University is only to carry into effect the purpose of sections 54-A and 56 above referred to. The Legislature has specifically expressed its intention that the register of graduates was to contain names of persons only for five years and not for life and that the old statutes in force at the commencement of the amending Act shall continue to be in force only until they are replaced by statutes made under the amending Act. Therefore, the Senate of the Madras University was competent under the amended Madras University Act to frame the new statutes regarding the register of graduates. It has carried into effect only the intenment of the Act. It is not correct to say that this has to apply only to the future. Where the old act was silent with regard to the persons who were entitled to have their names in the register of graduates and the period for which they were entitled to have their names on their register, the new statute has clearly laid down that only graduates who were residents in the Madras University area that were entitled to have their names entered in the register of graduates and that for a period of five years only. There is a clear intention to make a complete change and, therefore, the statutes of the University should be held to be valid. I hold, therefore, that there are no merits in this writ petition and it is, accordingly dismissed. There will, however, be no order as to costs.

V.M.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. PALANISWAMY.

G. Pulla Reddy, Specialist in Quality Sweets, Abids Circle, Station Road, Hyderabad, A.P. .. *Applicant**

v.

The Indian International Trade and Industries Fair, 1968, Madras, India by its Executive Secretary, Shenoynagar, Madras-31 .. *Respondent.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), *schedule II, Article* 1 (11) (n)—*Applicability—Judges Summons on the Original Side of the High Court for filing an arbitration agreement into Court and refer the dispute to an arbitrator—Court-fee payable—Nature of application.*

It is no doubt true that Article 1 (11) (*n*) of Schedule-II of the Madras Court-fees and Suits Valuation Act refers to an application under section 14 or section

*Diary No. 5572 of 1969. 11th September, 1969.

20 of the Arbitration Act. But the Article read as a whole clearly shows that the provision is applicable only to cases of applications for filing arbitration awards and not to cases of filing an arbitration agreement which has not resulted in an award. The quantum of Court-fee payable is based on the value of the subject-matter of the award and it is thus clear these could not apply to cases of such agreements where there is no question of any value till it is ascertained under an award to be passed.

Thus there is no specific provision in the Madras Court-fees Act, 1955 for such cases. An application of the type cannot also be treated as an original petition to attract the provisions of Article 1 (*l*) (*iii*) of Schedule II. Hence a Court-fee of Rs. 2 as 2 on Judges Summons would be enough on an application under sections 8 and 20 of the Arbitration Act for a direction to file into Court an arbitration agreement and for a reference of the dispute to an arbitrator to be appointed by the Court.

In the matter of an Arbitration agreement dated 28th November, 1967 and as contained in the Indian International Trade and Industries Fair, 1968—Madras (India), Rules and Regulations (as amended on 18th June, 1966 and 16th September, 1960).

Vedantham Srinivasan and *V. Aravamudam*, for Applicant.

The Court made the following

ORDER.—The question is what is the correct Court-fee payable in this case. The petitioner has taken out this application as Judges, Summons under sections 8 and 20 of the Arbitration Act, 1940, for a direction to the respondent to file an arbitration agreement dated 28th November, 1967 into Court and for making an order of reference of the dispute to an Arbitrator to be appointed by this Court. The applicant has paid a Court-fee of Rs. 2. The office has pointed out that Court-fee of Rs. 250 should be paid on the application on the basis that it has been presented to the High Court as provided in Schedule II, Article 1 (11) (*n*) of the Court-fees and Suits Valuation Act. This view does not appear to be correct. The earlier part of Article 1 (11) (*n*) no doubt refers to an application under section 14 or an application under section 20 of the Arbitration Act. But the subsequent portion refers to the value of the subject matter of the award as the criterion for a decision on the question of Court-fee. If the value of the subject-matter of the award does not exceed Rs. 5,000, the Court-fee payable is Rs. 15. If such value exceeds Rs. 5,000 but does not exceed RW. Rs. 10,000, the Court fee payable is Rs. 100, and if such value exceeds Rs. 10,000, the Court-fee payable is Rs. 250. From this it is manifest that the Legislature has intended that Court-fee is payable upon the value of the subject-matter of the award. But where there is no award, no question of value of the subject-matter of the award arises. In a case where there is only an agreement, which has not resulted in an award, the latter part of the Article is not attracted and the applicant who merely wants an arbitration agreement to be filed into Court cannot be called upon to pay Court-fee upon any value which is yet to be ascertained under the award to be passed.

Under the Court-fees Act of 1870 there was Article 18 in Schedule II which dealt with applications under section 14 or section 20 of the Arbitration Act. Under that Article, a Court-fee of Rs. 15 was payable upon such an application either for direction for filing an award or for an order for filing an agreement when it was presented to a District Munsif's Court or a City Civil Court. But if it was presented in a District Court or a Sub-Court, the Court-fee payable was Rs. 100. In re-enacting this provision in Schedule II Article 1 (11) (*n*) of the Act of 1955, the Legislature made some additions. But in making the additions, the matter was not made clear. Though the Article, as re-enacted, is intended to apply to a case of an application for filing an award and also to a case of an application for filing an agreement, the subsequent portion of the Article covers only a case of an award, and no provision is made as to the Court-fee payable on a application made only for the purpose of filing an agreement. As pointed out above, where the matter is only in the stage of agreement, there is no question of the value of the subject-matter of the

award. In this view, the language of Schedule II, Article 1 (11) (n) requires suitable amendment. Unless all the conditions laid down in that Article are satisfied, a mere application for filing an agreement cannot be brought within its ambit. This being only a Judge's Summons, the petitioner has paid Rs. 2 as Court-fee. This application cannot also be called an Original Petition so as to attract the application of Schedule II, Article 1 (l) (iii) requiring payment of Rs. 20 as Court-fee. The Court-fee of Rs. 2 on the Judge's Summons appears to be sufficient.

R.M. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P.S. KAILASAM AND MR. JUSTICE K.S. VENKATARAMAN.

Veeral *alias* Kanal .. *Appellant.**

Criminal Trial—Oral confessions—Evidentiary value.

Penal Code (XLV of 1860), *section* 302—*Charge of causing death of new born child by strangulation with umbilical cord—Nature of medical evidence required—Conclusiveness of medical evidence.*

It is well-settled that oral confessions which are not reduced to writing will have to be very carefully assessed before they can be acted upon.

[While the two judges agreed that in the peculiar circumstances of the case the accused (who was charged with having caused the death of her new born baby by strangulation with the umbilical cord) would have to be acquitted giving her the benefit of doubt, they differed on the question whether the medical evidence in the case conclusively established that the child was born alive and if so whether its death was caused by strangulation of the neck with the umbilical cord. Kailasam, J., was of the view that the medical evidence was inconclusive. Venkataraman, J., differed.

For a discussion of the nature of medical evidence required and the reasons for their respective views see the judgments of the two judges.]

Appeal against the judgment of the Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore in Sessions Case No. 196 of the Calendar for 1968, 11th January, 1969.

P.M. Sundaram, Amicus Curiae, for Appellant.

The Public Prosecutor, for State.

The Court delivered the folloing Judgments :

Kailasam, J.—The accused Veeral *alias* Kanal was tried by the learned Sessions Judge of Coimbatore for an offence under section 302 of the Indian Penal Code in that on 9th September, 1968 at about 3 A.M., at Vellaiakinar committed the murder of her new born female child by strangulation with the umbilical cord. The learned Judge found the accused guilty of the charge and sentenced her to under go rigorous imprisonment for life. In the circumstances of the case, the learned Judge has also made a recommendation to the Government for reduction of the sentence of imprisonment for life to one of rigorous imprisonment for a period not exceeding two years.

The accused was married to one Chinnan of Vellaikinar village. They had a son, Palaniswamy. Chinnan died about ten years ago. After her husband's death, the accused left Vellaikinar and went away somewhere, but she came back to Vellaikinar about four months prior to the occurrence. On the request of the accused, P.W. 1 Deival who has a house in the Harijan colony permitted her to live with P.W. 2, K. Chinnal and her daughter in a vacant shed belonging to P.W. 1 which is immediately north of the house of P.W. 1. Some time before the occurrence P.W. 1 came to know that the accused was pregnant. On the day prior to the occurrence, P.W. 1 met the accused and told her that she (P.W. 1) had heard that

* Crl. A. No. 156 of 1969. 18th September, 1969.

the accused was likely to cause miscarriage of her conception. The accused protested and stated that she was not of immoral character and that she would not cause any miscarriage, but would go to a hospital and have her delivery attended to.

According to P.W. 2, on the date of the occurrence, P.W. 2 and her daughter took their bed on the pial while the accused slept inside the shed. About first cock-crowing time, the accused woke up P.W. 2 saying that she wanted to answer calls of nature and asked P.W.2 to accompany her P.W.2 and the accused proceeded towards the *kuttai* which is on the south west. On the way, they saw P.W. 4 Muthan coming in the opposite direction. When questioned by P.W. 4 as to where they were going, the accused stated that she was going to the tank for easing. Then the accused went near the slope of the tank. A few minutes thereafter, she stated that she was going to deliver a child. P.W. 2, was standing a few feet away. A minute or two later, the accused delivered a child and the child gave out a cry. The accused then snapped the umbilical cord, put it round the child's neck and tightened it. Then there was no noise of the child. P.W. 2 protested at the behaviour of the accused. The accused knotted the umbilical cord round the child's neck. She then said that the child had died, and requested that P.W. 2 may keep silent over the whole matter. The accused then dug a small pit on the tank slope and placed the child in that pit. She covered the child with the blouse M.O. 1 belonging to the daughter of P.W. 2. A little while thereafter, the accused passed placenta and that was also put into the pit. The accused then covered the pit with mud. At the request of the accused P.W. 2 led her back to her house, and afterwards P.W. 2 went for her work.

At about 7 A.M., on 9th September, 1968, P.W. 5, Palanal, a girl aged about 13 years, was returning home from Karuppan Thottam belonging to one Krishnaswami Goundar, after picking flowers. When she passed the Kuttai near the burial ground, she saw the dead body of a female child on the sloping bund of the tank. She ran to the village and informed several people, including P.W. 1, Deival about what she saw. P.W. 1 on hearing from P.W. 5 about the dead body of the child lying near the slope of the tank, went to the spot and saw the child. She found the umbilical cord round the child's neck. According to her, there were contusions on the child's neck, and there was bleeding from the right ear and the tongue was protruding. Suspecting that the child must be that of the accused, she searched for the accused, but the accused was not found. Then P.W. 1 went to the house of the village munsif, P.W. 11 V. S. Venugopal and gave a statement Exhibit P-1 at about 10 A.M. In the report, P.W. 1 mentioned that she went and saw the child lying dead with the umbilical cord round the neck of the child. She further stated that on hearing the information, the accused skulked away and was chased and caught hold of by P.W. 10 Chinnan and was produced before the village munsif. In the complaint, it was reported that the accused committed murder of the female child by strangulation and thrown it away on the burial ground P.W. 11 recorded the complaint of P.W. 1 and obtained her left thumb impression. He would add that while recording Exhibit P-1, P.W. 10 produced the accused before him and he questioned her. According to P.W. 11, the accused wept and told him that she had strangulated the child with the umbilical cord and buried it in the slope of the tank, as otherwise the villagers would scold her and drive her out of the village for giving birth to a child in her state of widowhood. The village munsif sent reports to the police and the magistrate. At about 4-30 P.M., police came, and P.W. 15, K. Kanniappan, Inspector of Police saw the dead body of the child in the slope of the tank. The accused was produced before him. He arrested her and questioned her. He also held inquest over the body of the child. During the inquest he examined P.Ws. 1, 2, 4, 5 and others. P.W.15 then sent a requisition to the Sub-Magistrate, Coimbatore for sending the accused to the hospital for treatment and certificate.

P.W. 7, Dr. Krishnamurthi, Civil Assistant Surgeon, Government Hospital, Coimbatore admitted the accused in the hospital at 9-50 A.M., on 10th September, 1968, and referred her to the duty lady doctor P.W. 9. P.W. 9 Dr. Saroja examined

the accused and found that she must have delivered a child between 35 to 48 hours prior to her examination.

The dead body of the child was sent by the Sub-Inspector of Police to the hospital and P.W. 8 Dr. Sug ndhi, the Woman Assistant Surgeon attached to the Government Hospital, Sulur conducted the autopsy. According to P.W. 8, in this case, the umbilical cord must have been put round the neck of the child and knotted after the child's birth.

When examined in the Committal Court, the accused stated that it was true that she took P.W. 2 with her; but she would state that even at the time of delivery of the child, the umbilical cord was wound round the neck of the child. She got giddiness and fell on the child, and she did not wind round the umbilical cord around the neck of the child and she also did not kill the child. In the Sessions Court she stated that she took P.W. 2 with her, that she went to the tank and felt like answering calls of nature, that she sat down and realised that she had delivered and that she became unconscious thereafter. She added that she vaguely remembered having fallen over the child after it was deliv red. She stated that she would never have had the heart to kill the child even if it was illegitimate. She denied having told the village munsif that she killed the child.

The learned Sessions Judge on a consideration of the evidence placed before him found that the prosecution had proved its case beyond all reasonable doubt, convicted the accused under section 302 of the Indian Penal Code and sentenced her to imprisonment for life.

The case for the prosecution is that the child was born alive and that the accused strangulated it by putting a knot with the umbilical cord round the neck of the child and killed it. To substantiate this version, the prosecution relies on the testimony of P.W. 2. The prosecution further relies on the evidence of P.W. 11 the village munsif, who states that while he was recording the first inforamation report from P.W. 1, P.W. 10 produced the accused before him and the accused confessed that she strangulated the child with the umbilical cord and buried it in the slope of the tank. In addition to the evidence of these two witnesses, the prosecution relies on the medical evidence for proving that the death was due to strangulation by the use of the umbilical cord after the child was born alive.

Before considering the medical evidence, it is necessary to consider the evidence of P.Ws. 2 and 11, which if accepted would prove that the accused is guilty of the charge framed against her. As already stated, so far as P.W. 2 is concerned, it is common ground that P.W. 2 accompanied the accused to the tank slope where the child was delivered by the accused. The accused herself admits the presence of P.W. 2 along with her at that time. The evidence of P.W. 4 that she saw accused and P.W. 2 going together can be accepted. The question is whether the evidence of P.W. 2 that the accused delivered the child, that the child gave out a cry and immediately the accused snapped the umbilical cord, put it round the child's neck knotted it and the child died, can be safely accepted. It is admitted by P.W. 2 that the pregnancy of the accused was known to many women in the village. The accused came to the village four months before the date of the occurence and her advanced stage of pregenancy was known to the villagers. P.W. 2 also would admit that the accused did not take any step to cause miscarriage of the conception, nor did she attempt to leave the village and go away. She appeared to resign herself to the consequ nces of her act of folly. On this aspect, the evidence of P.W. 1 is that when she questioned the accused about her pregnancy, the accused stated that she was not of immoral character and that she would not cause any miscarriage of her conception, but would go to a hospital and have the delivery attended to. P.W.3 would say that the accused admitted to her that she was pregnant and implored her not to tell this to any one in the village. This evidence is not in accordance with that of P.Ws.1 and 2 who would state that the accused admitted that she was pregnant and that she was not going to cause any miscarriage and she would have the delivery

attended to in a hospital. It is therefore clear from the evidence of P.Ws. 1 and 2 that the villagers knew about the pregnancy of the accused and that the accused told the persons when questioned that she would not cause any miscarriage and she would join a hospital and have the delivery attended to. In this background, it is not possible to come to the conclusion that the accused was determined to kill her child when it was born. If P.W. 2 had known that the accused was calling her to help her in killing the child, she would be in the position of an accomplice and her evidence would require corroboration in material particulars. According to P.W. 2 she never expected that the accused would kill the child after the delivery. There is no reason for not accepting the evidence of P.W. 2 that she did not know that the accused wanted to put an end to the life of the child after the delivery.

The point that has to be considered is whether the statement of P.W. 2 that she saw the accused putting the umbilical cord round the neck of the child and strangulating it can be accepted. In cross-examination, it was specifically put by the accused to P.W. 2 that the child was born with the umbilical cord twisted round its neck and that it was a still born child. The witness denied the suggestion. But her subsequent conduct makes her testimony suspicious. According to her, at the request of the accused, she led back the accused to her house, she went away for work. She would state that at about 10 A.M., she learned that the villagers had known about the killing of the child by the accused and went to the village munsif's house and saw the accused there. She then told the people about the accused taking her to the tank slope and what followed thereafter. Strangely enough, the village munsif is completely silent about P.W. 2 coming to his house and telling about what she knew. If only P.W. 2, an eye-witness, had stated what she saw to the village munsif, the village munsif would have certainly spoken to it in Court. If P.W. 2 had given the information to the village munsif while he was preparing the reports that would have found a place in the village munsif's reports. P.W. 2 admitted that she was taken to the police station four or five days after the occurrence and was kept there for two days and sent away. She denied that even from Monday evening (that is the day of the occurrence) she was kept at the station for a week and thereafter sent home. There is no explanation for her being detained at the Police Station for two days even according to the witness. The conduct of P.W. 2 in not informing the villagers and giving a complaint is not explained. Further, her detention in the Police Station creates a suspicion that her evidence is not voluntary. The learned Sessions Judge found that the very fact that P.W. 2 did not go and inform any one in the village about the accused delivering a child and killing it would attract a certain amount of criticism to the evidence of P.W. 2. In spite of this defect in the testimony of P.W. 2, the learned Judge was prepared to accept it as the medical evidence 'clinchingly corroborated' the testimony of P.W. 2. I am of the view that criticism of the evidence of P.W. 2 is justified, and her evidence would not stand by itself.

The evidence of the village munsif that the accused confessed the crime was strongly relied upon by the learned Public Prosecutor. P.W. 11., the village munsif would state that the accused was produced before him by P.W. 10 and that when he questioned her, she wept and told him that she strangulated the child with the umbilical cord and buried it in the slope of the tank. P.W. 10 would state that he searched for the accused in the shed given to her and as she was not there, he searched for her in the village and found her about three furlongs east of the village on the road leading to Saravanampatti. He told the accused that she should not leave the village without the matter of the child's death being cleared and brought her to the village and handed her over to the village munsif at about 10 A.M. In cross examination, it was put to the witness that the accused was not going away from the village, but was brought from a tea shop. There can be no doubt from the testimony of P.W. 10 that the villagers suspected foul-play by the accused in the death the child and forcibly took her to the village munsif's house. Taking the surrounding circumstances into account, it is very likely the accused would have been subjected to a near inquisition by the villagers when she was produced before the village munsif.

It is also probable that the village munsif suspecting her would have put some questions. In the circumstances, even if she had made a statement, the voluntary nature of that would have to be carefully considered. It is well settled that oral confessions which are not reduced to writing will have to be very carefully assessed before they can be acted upon. Added to that, in this case, the voluntary nature of the statement, if ever she made one, is also open to doubt. More than all these facts, the question whether the accused did make a confession or not has to be considered. According to the village munsif, the accused made the confession while he was making the report. If the accused had made such a confession before the village munsif when he was recording Exhibit P-6, certainly P.W. 11 would have included it in Exhibit P-6 or would have at least stated about the confession as an addenda to the report. When questioned about the non-inclusion of this fact in Exhibits P-7 and P-8, the village munsif while admitting that he had not made any reference about questioning the accused and about her admitting the guilt, did not offer any explanation. The learned Sessions Judge accepted the testimony of P.W. 11 as he thought that there was no reason for an independent and respectable witness like him to perjure against the accused. I am unable to accept the assessment of the evidence of P.W. 11 by the learned District Judge, for, prudence dictates that one should be very cautious before an oral confession by an accused is accepted. For the reasons which I had set out above, I feel that it is extremely unsafe to place any reliance on the testimony of P.W. 11 that the accused confessed the crime to him.

The question that remains to be considered is whether the medical evidence conclusively establishes that (1) the child was born alive and (2) that its death was caused by strangulation of the neck with the umbilical cord. The evidence of the doctor who conducted the post-mortem, P.W. 8 Dr. Sugandhi, is that she found the umbilical cord tied around the neck of the child and contusions and abrasions were seen all around the neck with a knot in the umbilical cord on the right side of the neck. In her opinion, the child appeared to have died of asphyxia due to strangulation with the umbilical cord. She also was of the view that the child would not have been a still born child, and the child must have been alive at the time of the birth and it must have died there after due to asphyxia, as otherwise the internal organs would not have been in a congested state. She admitted that the umbilical cord could have been found round the neck of the child along with the kenos at the time of birth. But in this case, because of the presence of contusions and abrasions on the neck of the child, the cord must have been put round the knot and knotted after the child's birth. She further stated that the contusions and abrasions on the cilds' neck could have been caused due to some pressure being applied at the place with human fingers. In cross examination, the doctor admitted that there were no nail marks on the childs neck. The doctor arrived at her opinion that the child ought to have been born alive from the fact that the internal organs were found to be in a congested state. She also concluded that the umbilical cord must have been put round the neck and knotted after the child's birth from the fact that there were certain contusions and abrasions in the neck.

The question arises whether these symptoms conclusively establish that the child was born alive and whether death was caused by strangulation by knotting the umbilical cord round the neck of the child. A child is considered to be born alive when, after complete extrusion from the mother, it exhibits some sign of vitality such as for example, activity of the heart, breathing, movement of the limbs, crying, etc. Where respiration is not established, it is essential for a person who was present at the delivery to give evidence of the complete birth, as well as of the subsequent sign of life. (Taylor's Principles and Practice of Medical Jurisprudence Volume II, page 115). In this case, as already stated I am not prepared to place much reliance on the evidence of P.W. 2 who speaks to the child being born alive. In this case, there is no attempt to establish respiration. At page 116 of the learned author states that it is important to consider most carefully the accepted signs of live birth and to discuss the nature and value of the deductions which may legitimately be drawn from them. Evidence of life may be drawn from various circumstances such as

breathing (expansion of the lung, air in the stomach or bowel), crying, muscular movements, circulation and heart-beat, etc. In this case, apart from the oral testimony of P.W. 2 that the child cried, which I am not prepared to accept, no evidence as to breathing or circulation and heart-beat was deposed to. Evidence as to breathing is considered essential, for, several changes are produced in the lungs after the child starts breathing when it is born alive. A tabulation is given by Taylor as to the changes caused to the lungs of the child after a live birth. For instance, the volume of the lungs becomes four to six times larger, their margins get rounded, the colour changes, air sacs become visible, they contain full of blood which is frothy on squeezing, the weight of the lungs increases and the expanded areas float in water. Neither the evidence of the doctor nor the post mortem discloses that any attention was paid to these aspects, and there is no mention of the lungs except stating that all internal organs were found congested. At page 122 the learned author points out as follows :—

> "Another common cause for foetal distress at, and after, birth is cerebral damage due to moulding or to encirclement of the neck by the cord causing engorgehment of veins..............These changes, too, may stimulate those of asphyxiation, but suspicion must not be maintained in the face of a reasonable natural possibility such as difficult labour."

Referring to hydrostatic test, it is pointed out that microscopic examination of the lung will be necessary before an opinion can be expressed. The various other tests which are prescribed by the medical science to determine whether the child was born alive or still born were not performed. The conclusion of Taylor after a discussion on the medico legal aspects on this question at page 150 is significant and may be extracted:

> "The conclusions to be drawn from these observations are that if the Courts were to insist upon conclusive medical evidence of a separate existence in every trial for child murder or infanticide, there would be very few convictions, except where a confession was made by the accused, where the infant was found alive but dying, or the crime was committed in the presence of eye-witnesses."

But in this case, the alleged confession by the accused cannot be accepted and the evidence of the eye witness P.W. 2 is suspect. The medical evidence is not helpful since the necessary tests have not been performed, and the data that is furnished by the medical evidence, is grossly inadequate. In this state of evidence, it is extremely hazardous to come to the conclusion that the child was born alive.

I will now proceed to consider whether the medical evidence has established that the death was homicidal or caused by strangulation of the neck by knotting the umbillical cord. To recapitulate, the evidence of the doctor is that she found the umbilical cord tied around the neck of the child and contusions and abrasions were seen around the neck and that the knot in the umbilical cord was on the right side of the neck. The cord was not found attached to the naval and the doctor was of the view that the cord was snapped from the child's naval after the birth. The doctor also did not find any nail marks on the child's neck. The aspects relied on by the prosecution are the presence of a knot in the umbilical cord on the right side of the neck, the contusions and abrasions around the neck and the snapping of the cord from the child's naval. The encircling of the cord round the neck is not uncommon and Taylor reports at page 144, on the authority of Walker, that the cord encircles the neck in some twelve per cent of cases, occasionally twice, and it has caused death in many instances, in spite of skilled assistance. Though not very common cases have been reported from time to time in which an actual knot has been found in the cord. For such knot to occur, the body of the child in its movements *in utero* must have passed through a loop of the cord, forming a knot, which may be tightened by its further movements. Taylor again quotes Bardinar who found that in ten per cent of cases the cord may encircle the neck more than once or be knotted, though these abnormalities are rare. Again at page 172, the author states the position thus:

"Where the cord is knotted the possibility of its being a natural obstetric event, though not entirely eliminated (for the cord is occasionally found knotted in obstetric practice), becomes more remote, and the likelihood of wilful strangulation looms large, unless the cord is knotted several times a wilfull act cannot, however, be regarded as proven."

Thus, no inference as to homicide can be inferred from the fact that the strangulation was by the umbilical cord. But the knot that is found is rather uncommon and leads to a suspicion that it may be homicide. But the possibility of such a knotting due to natural causes cannot be ruled out.

The snapping of the cord is also not uncommon for Taylor points out at page 145 that in precipitate labour the cord, especially when very short, may be torn. The cord may be severed in other ways, either by accident or deliberately. When the cord is used as a strangulating ligature, it may show evidence of having been handed roughly. In this case, the doctor has not noted any evidence of the ligature having been handed roughly. The contusions and the abrasions on the neck of the child, on which the doctor relied on, do not also conclusively establish that death was due to homicide. Marks of finger nails on the neck are not uncommon. The learned Author at page 171 finds that in self assisted deliveries the mother may claw with the fingers in desperation to get the infant out and have done with her troubles. In this case, there were no nail marks. The doctor P.W. 8 herself admitted that the contusions and abrasions on the child's neck could have been caused due to some pressure being applied at that place. This may be at the time when the delivery took place or even due to the encirclement of the cord. The author finds that when a child is born with the umbilical cord round the neck, it is not uncommon to find injuries on the neck. At page 156, the author quotes an instance where the cord was coiled three times around the neck, passing under the right armpit; and upon removing it, three parallel discoloured depressions were distinctly marked. These extended completely around the neck and corresponded to the course taken by the coils. Much reliance cannot therefore be placed on the presence of contusions and abrasions on the child's neck.

The snapping of the cord is relied on by the prosecution as a very strong circumstance indicating violence. The doctor has found that the skin in the abdomen was found to have been peeled off and hence according to her, it is quite likely that the cord was snapped from the child's naval after the birth. Whether the snapping of the cord was accidental or deliberate, the doctor has not offered any opinion. As already pointed out, the snapping of the cord by accident cannot be ruled out. In the circumstances, I am unable to place any reliance on the fact that contusions and abrasions were found on the neck of the child or that the cord was found snapped. Considering the medical evidence as a whole, I am of the view that it is far too inconclusive to find, that death was due to strangulation by intentionally tying the umbilical cord on the neck of the child. Having rejected the alleged confession of the accused as spoken to by P.W. 11, and the oral evidence of P.W. 2, and having found the medical evidence inconclusive, I am satisfied that the conviction of the accused cannot be accepted. The accused is entitled to the benefit of doubt, and should be acquitted. I would allow the Criminal Appeal, set aside the conviction and the sentence imposed on her and set her at liberty.

Venkataraman, J.—I agree that the appellant will have to be acquitted, but I would put my reasoning on some aspects in a different form. At the outset I agree with my learned brother that it is unsafe to act on the testimony of P.W. 11 that the accused made an extra-judicial confession of the murder. If the accused had made such a confession, P.W. 11 would have referred to it in his forwarding report.

So far as the evidence of P.W. 2 is concerned, it seems to me that even when she left the house along with the accused, she knew that the accused expected to deliver a child and wanted to dispose it of. In this view of the matter P.W. 2 would be in position of an accomplice and that is also the view of the learned Sessions

Judge. The reasons for my view are these. P.W. 2 admits that previous to that night she had not accompanied the accused for her answering calls of nature and that during nights they would answer calls of nature even at places near their house. Actually the evidence of the Circle Inspector of Police (P.W. 15) shows that the place where the dead body was buried was about a furlong from the shed of the appellant. If it was merely for answering calls of nature, P.W. 2 would have asked the accused why it was necessary to go so far. P.W. 2 no doubt states in chief examination that the tank was the usual place where they would go for answering calls of nature, since water was available there. Obviously P.W. 2 would be interested in suppressing the fact that she was an accomplice, and therefore gave such evidence in chief examination. Further, it is difficult to believe that the appellant had taken M.O. 1 the blouse belonging to P.W. 2's daughter without the knowledge of P.W. 2. It may be noted that the cross-examination on behalf of the accused was that P.W. 2 has taken M.O. 1 on coming to know that the accused had developed labour pains. Really the whole cross-examination proceeds on the basis that it was P.W. 2 who killed the child and wanted to foist the blame on the accused and therefore did not inform anybody. Her conduct in not informing the villagers of what the accused did, according to her, till 10 A.M., fits in which the view that P.W. 2 is really in the nature of an accomplice. She was kept at the police station for two days. If he was a mere innocent witness, why should she have been kept at the police station for two days?

My learned brother thinks that the medical evidence has not conclusively established that the child was murdered and that we cannot rule out the possibility of the child having been born dead with the umbilical cord round the neck. With great respect, I am, however, inclined to differ from my learned brother on this aspect. It seems to me that the evidence of P.W. 8, that the child died of asphyxia due to homicidal strangulation with the umbilical cord, must be accepted. The doctor gave three reasons in support of the conclusion; (*i*) contusions and abrasions were seen all a ound the neck with a knot in the umbilical cord on the right side of the neck; (*ii*) on dissection she found the subcutaneous tissues in the neck to be echymosed; (*iii*) the internal organs were congested. It seems to me that the two facts, *viz.*, the presence of contusions and abrasions around the neck, and echymosis of the subcutaneous tissues in the neck prove violence and pressure at that place. Those circumstances, taken along with the congestion of the internal organs and the remoteness of the possibility of the child being born dead with the umbilical cord around the neck with a knot at the time of the birth are sufficient to show that death was due to homicidal violence and strangulation with the umbilical cord and pressure with hands. Though the doctor is not positive, she also says that, because the skin of the abdomen was found to be pealed off, it was likely that the cord was snapped from the child's naval after the birth. Modi at page 374 of the Fifteenth edition (1965) states:

> "*Strangulation.*—This is also a common form of child murder. During the act of strangulation far greater violence is used than necessary, and severe marks of abrasions and contusions with extravasation of blood in the soft tissues are usually found on the neck."

Lower down he says:

> "Rarely, the natural folds of the skin in the neck of a fat child may resemble the cord marks caused by strangulation, but in that case no marks of abrasions or any extravasation of blood will be visible on the neck."

These passages support the evidence of the doctor that death was due to homicidal strangulation.

Similarly Taylor at page 172 of the Twelfth edition states:

> "Marks of encirclement by the umbilical cord are seldom clear cut, for the cord is soft and its 'weave' or 'twist' of vessels too easily flattened by the pressure of tightening to cause a visible pattern on the skin."

This again suggests that, where contusions and abrasions are present, as in the case, it is not a case of natural death by encirclement of the umbilical cord prior to birth.

Apart from the medical ev'dence itself, we cannot 'gnore the other pieces of circumstancial evidence in the case which go to show that it was not a case of the child being born dead w.th the umbilical cord around its neck with a knot. I the first place, the circumstances of the case taken as a whole clearly suggests that the accused and P.W. 2 went to the tank knowing that there would be delivery soon and intending that the child when born should be disposed of. Under the circumstances, it seems to me to be too good a coincidence to be true that the child was born dead with the umbilical cord around the neck, relieving the accused and P.W. 2 of the necessity of killing the child. Again, if the child was born dead with the umbilical cord around its neck, there was no need at all to bury the child. Indeed, one would expect the conduct of the accused and P.W. 2 to be different from what it was if the child was born dead with the umbilical cord round the neck. If that was what happened, we could expect P.W. 2 and the accused not to have buried the child, but to have called somebody to witness the fact that the child was born dead with the umbilical cord around the neck in order to divert the unjustified suspicion which might otherwise fall on them of their having murdered the child. Actually neither P.W. 2 nor the accused opens her mouth till when the matter came to light otherwise by the discovery of the corpse by P.W. 5 and the reporting of the matter to the village Headman by P.W. 1.

It would therefore follow that between themselves P.W. 2 and the accused murdered the child after it was born alive. But here comes my difficulty, because we cannot completely rule out the possibility of P.W. 2 herself having played more active part than what she would allege and, in fact, having been primarily instrumental for the death of the child. The accused herself might have been quite exhausted because of the delivery of the child and P.W. 2 might have taken the active part in murdering the child and disposing it of. One can no doubt ask whether on this line of reasoning the accused would not be guilty, by invoking section 34, Indian Penal Code, of having shared with P.W. 2 the intention to murder the child. But the answer to this question is that that is not the case with which the prosecution came forward and it would be unfair to the accused to convict her on such a basis when she had no notice at all of such a case. Under such circumstances it would not be proper or even legal for the Court to alter the conviction of the appe'lant unde section 302 into one under section 302 read with section 34, India Penal Code.

It is in this view of the matter that I agree that the appellant will have to be acquitted.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE P. R. GOKULA-KRISHNAN.

M/s. Gajendra Transports (P.) Ltd., Tiruppur .. *Appellant**

v.

The Anamallais Bus Transports (P.) Ltd., Pollachi and another .. *Respondents*

Motor Vehicles Act (*IV of* 1939), *sections* 47 (3), 48 (1), 57 (3) *and* 64 (1)—*Interpretation —Stage carriage permits, grant of—Applications for permits, if could be entertained without fixing the ceiling under section* 47 (3).

Constitution of Indian (1950), *Article* 226—*Scope—Proceedings of the Regional Transport Authority under section* 57 (3) *of the Motor Vehicles Act—Initial jurisdiction totally wanting—The respondent not raising the objection of total want of initial jurisdiction either before the Authority or in appeal—High Court, if could allow the plea to be raised for the first time in* certiorari *or prohibition.*

Without a prior order under section 47 (3) of the Motor Vehicles Act, applications for stage carriage permits for the relevant route could not be entertained,

*W. A. No. 274 of 1968. 6th October, 1969.

and the Regional Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under section 47 (3). This means that an order under section 47 (3) is a condition precedent to the exercise of power under section 48 (1) read with section 57. Particularly, the proviso to section 57 (3) contemplates an order under section 47 (3) prior to the reception of applications for permits. The limit under section 47 (3) cannot also be decided in, or simultaneously with the proceedings under section 57 (3), the object of which, is to select the best out of competing applicants, while section 47 (3) proceedings are devoted to a determination of the ceiling for grant of stage carriage permits in a region, area or route. There is also the further indication in the opening words of section 48 (1) that any permit issued for a stage carriage can only be subject to the provisions of section 47 (3), which means not only the limit fixed under section 47 (3), cannot be exceeded, but without fixation of any limit, the power to grant permits under section 48 (1) cannot be exercised. If, follows further that any question related to fixation of limit under section 47 (3) cannot be within the purview of section 64 (1).

Since without a prior order under section 47 (3) no application for a permit could be entertained for notification under section 57 (3), the absence of such an order goes to the root of the jurisdiction of the Regional Transport Authority to exercise its powers under section 48 (1) read with section 57. The point as to such an absence of a prior order could be raised at any stage of the proceedings under section 57 (3), or thereafter, and its admissibility at any further stage, should not be made dependent on representations in that regard having been made in time under section 57 (3). In cases like this, where initial jurisdiction is totally wanting because of the absence of an earlier order under section 47 (3), High Court in the exercise of the discretion, will not be prepared to ignore the ground merely on the basis that it had not been taken at the earlier stages, and allow an order to continue in force, although it was made without jurisdiction.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Ramakrishnan, dated 4th July, 1968 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 2377 of 1968 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with Appeal Nos. 1875, 2013 and 2018 of 1967 on the file of the Additional State Transport Appellate Tribunal, Madras, and quash the judgment dated 11th June, 1968 and made in the said Appeal Nos. 1875, 2013 and 2018 of 1967.

V. K. Thiruvenkatachari for *C. Ramaswami* and *M. Kalyanasundaram*, for Appellant.

N. G. Krishna Iyengar and *S. Varadachari*, for 1st Respondent.

The Government Pleader, for 2nd Respondent.

The Order of the Court was made by

Veeraswami, C.J.—This appeal is from a judgment of Ramakrishnan, J., dismissing the appellant's petition under Article 226 of the Constitution to quash an order of the second respondent, Additional State Transport Appellate Tribunal, Madras. The Regional Transport Authority, Coimbatore, out of 42 applicants, selected the appellant for grant of a stage carriage permit to ply an additional bus on the route Pollachi to Tiruppur (*via*) Kamannickanpalayam and Palladam. Three of the disappointed applicants preferred appeals to the second respondent, which allowed them and remitted the matter to the Regional Transport Authority, for being proceeded with in accordance with law. The first respondent, which was one of the applicants, had raised a preliminary objection to the introduction of an additional bus on the route, on the ground that it was not given additional trips for its existing buses, and that further a new route bus had also been introduced between Erode and Pollachi (*via*) Tiruppur. The Regional Transport Authority,

repelled the objection on the view that there was need for introducing more number of buses on the route connecting the important commercial centres, Tiruppur and Pollachi, and that a grant of further permit on the route was considered necessary. It would appear that there were already six permits on the route. In the appeal filed by the first respondent, it, however, urged for the first time, a different objection that the Regional Transport Authority, without making a prior order under section 47 (3) of the Motor Vehicles Act, limiting the number of stage carriages for which permits would be granted on the route, had no jurisdiction to proceed with the applications under section 57 (3) of the Act. The second respondent accepted the objection as valid, and it was on this sole ground, it allowed the appeals remitting the matter as aforesaid. The propriety of this view of the second respondent is impeached by the appellant. As the same point is said to arise in a number of other petitions pending disposal in this Court, we have permitted arguments to be addressed to us not merely by Counsel in the appeal under consideration, but also other Counsel interested on the point.

Though the Tribunal's conclusion seems to be supported by abundant authority, as we shall notice presently, Mr. Thiruvenkatachari, contends that it went no further than holding that where a limit had been fixed under section 47 (3), the Regional Transport authority, while considering applications under section 57 (3) would be bound by it under the proviso to the sub-section, and should summarily dismiss the applications if a further grant of permits would transgress the limit. On that view of the decided cases, he has submitted that section 47 (3) contemplates fixation of the maximum limit of the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region, that the limit so fixed is of a general character not affecting or preventing consideration, subject to the general limit fixed, of the question of adequacy of transport service already existing on a specified route, or in the region, or in specified area, and that, therefore, where there has been no limit fixed under section 47 (3), for a route, area or region, there is no bar to grant of permit under section 48, subject of course, to the question of adequacy. On the other hand, it is pressed upon us that the Regional Transport Authority, cannot proceed unless a limit had been fixed under section 47 (3) before a notification under section 57 (3). On this submission, prohibition has been asked for in a petitions agains the Regional Transport Authority from proceeding further without a prior order under section 47 (3). On the other view of the matter, orders of the Tribunal are sought to be quashed in certain other cases where the tribunal had itself taken the point relating to section 47 (3) and set aside the orders of the Regional Transport Authority, granting a permit, or where it had the objection based on section 47 (3) raised in appeals filed before it by unsuccessful applicants who raised the question either for the first time or not. If the controversy were *res integra*, it would have been necessary for us to embark on an elaborate consideration of it. But out of deference to the arguments presented before us, we shall first notice the relevant statutory provisions.

Chapter IV of the Motor Vehicles Act is devoted to the control of transport vehicles. After providing for necessity for permits for use of any vehicle in a public place, and for power of the State Government to control road transport and to issue orders and directions to Transport Authorities as well as for setting up of hierarchy of Transport Authorities, sections 45 and 46 state as to whom an application for permit should be made, and what particulars it should contain. Section 47 (1) directs that in considering an application for a stage carriage permit, a Regional Transport Authority should have regard to the matters specified in clauses (*a*) to (*f*) and also any representations made by the persons indicated. Among the matters to be so kept in view, are the interests of the public generally, and the adequacy of other passenger transport services operating or likely to operate in the near future, whether by road or other means, between the places to be served, as well as

the benefit to any particular locality or localities likely to be afforded by the service. A stage carriage permit should be refused, as directed by sub-section (2) if the time table furnished showed that the provisions as to speed limits prescribed by the Act were likely to be contravened. Then come sub-section (3):

> "A Regional Transport Authority, may having regard to the matters mentioned in sub-section (1), limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region."

Section 48 empowers a Regional Transport Authority to grant a stage carriage permit on an application made to it. But such a grant shall be subject to the provisions of section 47. The procedure for applications, and granting permits, has been prescribed by section 57. An application may be made at any time. But there should be an interval of not less than six weeks between the making of the application, and the date on which the permit is desired to take effect. Sub-section (3) requires notification of the applications or their substance in the prescribed manner, with a notice of the date before which representations might be made, and of the time and place at which the applications and representations received would be considered. This sub-section has a proviso:

> "Provided that, if the grant of any permit in accordance with the application or with modifications would have the effect of increasing the number of vehicles operating in the region, or in any area or on any route within the region, under the class of permits to which the application relates, beyond the limit fixed in that behalf under sub-section (3) of section 47 or sub-section (2) of section 55, as the case may be, the Regional Transport Authority may summarily refuse the application without following the procedure laid down in this sub-section."

The rest of the provisions of section 57, among other things, provide for a public hearing on the applications notified and representations duly received. Section 55 (2) is analogous to section 47 (3) except that it relates to public carrier's permit. Section 64 (1) (*a*) gives a right of appeal to a person aggrieved by a refusal of the appropriate authority to grant a permit, and section 64-A gives powers of revision to the State Transport Authority, in respect of orders of a Regional Transport Authority and from which no appeal lies. In the foregoing setting of the statutory provisions, sections 45, 46, 47 (1) and (2) and 50 are related to making of applications for permits, the particulars which the applications should contain, and the matters which the Regional Transport Authority must have regard to. Section 57, as we said, prescribes the procedure for disposing of such applications. Section 48 (1) provides for the power of the Regional Transport Authority to grant, subject to section 47, stage carriage permits, and section 51 (1) for the grant, subject to section 50, of a contract carriage permit. Section 54 provides for an application for a public carrier's permit, and section 55 (1) contains matters which the Regional Transport Authority should take into account in considering such an application. Subject to section 55, a Regional Transport Authority may grant a public carrier's permit. The orders contemplated under sections 48, 51 and 56 (1) are *ad hoc* so to speak, in nature, and are related to particular grants of permits on applications made therefor, and the grants made on a selection basis after taking into account the relevant statutory considerations mentioned by the statutory provisions and subject to the limits fixed under section 47 (3) and 55 (2). Order fixing limits under sections 47 (3) and 55 (2) are not related to any particular application for any kind of permit, but are of a general character, though in making such orders the Regional Transport Authority is directed to bear in mind the matters specified by sections 47 (1) and 55 (1) which include not merely public interest in general, but also the adequacy. But "adequacy" in the context of sections 47 (3) and 55 (2) should be understood, as we think, not in the context of granting particular applications for permits, but in a general way so as to prescribe the maximum number of permits that may be granted in a region, area or any specified route within the region, for stage carriages generally, or stage carriages of any specified type, or of transport vehicles generally or transport vehicles of any specified type. The

approach to the consideration of adequacy cannot, therefore, be the same in considering grant of permits on a route, or for an area as for fixing the limit, which is indicative of the maximum number of stage carriages, or public carriers generally of any specified type for which permits may be granted in the region or area or on a specified route as a whole. When a limit is fixed under section 47 (3) or 55 (2) it should be adhered to by the Regional Transport Authority in granting permits because of the proviso to section 57 (3). If grant of a permit will be in excess of the limit fixed under section 47 (3) or 55 (2), the Regional Transport Authority should summarily refuse the application therefor, without notifying it. So far there is no difficulty. But where no limit has been fixed under section 47 (3) or section 55 (2), is it required that there should first be such a fixation of limit before reception or notification of an application for a permit? Mr. Thiruvenkatachari, says that the answer should be in the negative. He submits that the opening words of sections 48 (1) and 56 (1) read with the proviso to section 57 (3), should not, and cannot be construed as expressly or by implication making any such requirement. If a limit has been fixed under sections 47 (3) or 55 (2) of the maximum number of permits that could be granted in any region, area or route, and if the permits for which applications have been made are within such maximum, no difficulty may arise, though even in such cases, the question of adequacy may be open before the Regional Transport Authority which may think, on the representations made before it, that notwithstanding the maximum fixed, transport facility already existing in the region, area or on the route was adequate or sufficient, and no grant of further permits was necessary. It was urged that the position can be no different if a limit has not been fixed under section 47 (3) or 55 (2), and there is nothing in the opening words of sections 48 (1) and 56 (1) read with section 47 (3), 55 (2) and the proviso to section 57 (3), which points to a requirement that the notification of applications under section 57 (3) should be preceded by an earlier order either under section 47 (3) or 55 (2) as the case may be. On a careful consideration of, the argument, in our view, it is not possible to say that it is without force. Our attention has been invited to the structure of section 50 which seems to assist the contention. But the construction which Thiruvenkatachari wants us to place, as aforesaid, on the relative statutory provisions is not open to us in view of the well settled authorities to the contrary. The formidable difficulty in the way of Mr. Thiruvenkatachari's argument is the structure of the relative statutory provisions and their interrelation. Particularly, the proviso to section 57 (3) contemplates an order under section 47 (3) prior to the reception of applications for permits. The limit under section 47 (3) cannot also be decided in, or simultaneously with the proceedings under section 57 (3), the object of which is to select the best out of competing applicants, while section 47 (3) proceedings are devoted to determination of the ceiling for grant of stage carriage permits in a region, area or route. There is also the further indication in the opening words of section 48 (1) that any permit issued for a stage carriage can only be subject to the provisions of section 47 (3), which means not only the limit fixed under section 47 (3), cannot be exceeded, but without fixation of any limit, in our view, the power to grant permits under section 48 (1) cannot be exercised. Logically, therefore, grant of permits first, and then fixation of the ceiling next or simultaneously, will not be permissible. It follows further that any question related to fixation of limit under section 47 (3) cannot be within the purview of section 64 (1). The point as to adequacy will be relevant, as the proceedings under section 57 (3) will be subject to the limit fixed of the number of stage carriages for which permits can be granted in a region, area or on a route. This view of the effect of the relevant provisions of the Act is abundantly supported by authority.

In *Abdul Mateen* v. *Ram Kailash*[1], which was concerned with the Motor Vehicles Act as amended by Bihar Act XXVII of 1950, the Supreme Court, after referring to the related sections held :

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1. (1963) 3 S.C.R. 523 : A.I.R. 1963 S.C. 64.

"The scheme of the Act therefore is that a limit is fixed under section 47 (3) and the applications received are dealt with in the manner provided by section 57 and permits can be granted under section 48 subject to the limit fixed under section 47 (3)".

The Court earlier pointed out that, although the power to fix a limit under section 47 (3) and the power to grant permit under section 48 (1) following the procedure prescribed by section 57, are vested in the same Regional Transport Authority, nevertheless, fixation of any limit or its modification is not a matter for consideration when the Regional Transport Authority is dealing with an actual grant of permit under section 48 read with section 57, for, at that stage what the Regional Transport Authority has to do is only to choose between various applicants who may have made applications under section 46 read with section 57. The Court proceeded to say :

"That in our opinion is not the stage where the general order passed under section 47 (3) can be re-considered for the order under section 48 is subject to the provisions of section 47, which includes section 47 (3) under which a general order limiting the number of stage carriages etc., may have been passed."

That was a case of a new route in respect of which applications were invited for grant of two stage carriage permits. Two of the applicants were granted each a permit. One of the unsuccessful applicants who had failed before the appellate authority, took the matter in revision to the State Government of Bihar. While declining to interfere with the appellate order, the State Government considered that an additional service could be allowed on that route, and that would add to the facility provided for without affecting the efficiency of existing service, and on that view, granted a permit to the petitioner before it. Another disappointed applicant who moved the Government to exercise its revisional powers, but failed to get a permit, filed a writ petition before the High Court challenging the order of the Minister for Transport. The High Court held, and its conclusion was upheld by the Supreme Court, that the State Government had no power when dealing with an application under section 64-A to increase the number of permits to be granted from two (fixed by the Regional Transport Authority) to three, and quashed the order of the Government granting the third permit. Dealing with the contention that there were no limits fixed by the Regional Transport Authority, and, therefore, it was open to the State Government to increase the number of permits from two to three, the Supreme Court held, again agreeing with the High Court, that the route being a new one, it should be deemed from the notification calling for applications for two permits that the Regional Transport Authority had fixed the limit at two. In expressing that view, the Supreme Court stated :

"It may be conceded that it may not be generally possible to conclude from the number of vacancies shown in an advertisement of this kind that that is the number fixed under section 47 (3) by the Regional Transport Authority. There is, however, in our opinion, one exception to this general rule, and that is when a new route is being advertised for the first time.

In the case of a new route it is clear that the Regional Transport Authority must have come to some conclusion as to the number of stage carriages which were to be permitted to operate on that route and the advertisement would only be issued on behalf of the Regional Transport Authority calling for applications for the number so fixed.

Otherwise, it is impossible to understand in the case of a new route why the advertisement was only for two vacancies and not (say) for four or six.

Whether the advertisement is with respect to an old route the fact that the advertisement mentions a particular number of vacancies would not necessarily mean that that was the number fixed under section 47 (3) for the number fixed may be much more and there may be only a few vacancies because a few permits had expired."

Jaya Ram Motor Service v. *Sri S. Rajarathinam and others*[1], substantially accepted the view in *Abdul Mateen* v. *Ram Kailash*[2], as to the scheme, scope and effect of sections 47, 48 and 57. The Regional Transport Authority, Ramanathapuram, had in that case decided earlier to introduce a new bus route, and called for applications for a permit. While considering the applications under section 57 (3), it modified its earlier decision and decided to refuse all applications on the ground that there was no longer any need for any such permit. The Supreme Court held that the order of the RegionalTransport Authority was contrary to its previous order passed under section 47 (3). On an examination of the Scheme of the Act, the Supreme Court observed :

> " Therefore, section 47 envisages two stages of the inquiry; (*i*) the fixing of the number of permits under section 47 (3) and (*ii*) the consideration thereafter of the application for grant of a permit and the representations, if any, by the persons mentioned in section 47 (1).................................
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> Therefore, once the limit is fixed, if the grant of an application does not have the effect of exceeding that limit the only question before the Authority would be whether the applicant if a person fit to be granted the permit or not in the light of the matters set out in sub-section (1) of section 47. The question of the number of permits to be granted, having been already canvassed and decided cannot become the subject at that stage of any further controversy. This is clear from the fact that section 48 (1) which empowers the Authority to grant or refuse to grant the permit starts with the words 'subject to the provisions of section 47'. It is therefore clear that the Authority has first to fix the limit and after having done so, consider the application or representation in connection therewith in accordance with the procedure laid down in section 57 ".

The question in *Lakshmi Narain Agarwal* v. *State Transport Authority, U.P.*[3], was whether a revision lay under section 64-A against an order under section 47 (3) which was answered in the affirmative. The Supreme Court declined to accept as valid the view of the State Transport Authority that the only way to question the order under section 47 (3) was by means of a representation to be made under section 57 (3), and in case the representation was rejected, the representator would have a right of appeal before the State Transport Appellate Tribunal. The High Court had dismissed the writ petition to quash that order on the view that an existing operator had no say in the matter of determination of the strength on a route under section 47 (3), and it was in the discretion of the Regional Tranrport Authority to determine the strength on a route, after considering various matters enumerated in clauses (*a*) to (*f*) of sub-section (1) of section 47. Since the High Court also considered that the order under section 47 (3) was a good one on its merits, it did not think it necessary to decide whether a revision lay under section 64-A against an order under section 47 (3). The Supreme Court was, for the purpose of the case, unable to say that no existing operator could be aggrieved against an order made under section 47 (3), and felt that it would depend on the facts and circumstances of each case. The importance of *Lakshmi Narain Agarwal* v. *State Transport Authority U.P.*[3], lies in the fact that in effect it held that an order under section 47 (3) could not be questioned in proceedings under section 57, but only by way of revision under section 64-A. In *Baluram* v. *State Transport Authority, Madhya Pradesh*[4], the Scheme of the sections under consideration was reviewed over again. The actual decision there was that once a ceiling has been fixed under section 47 (3), it could not be exceeded while considering applications under section 57, because the modification of an order under section 47 (3) was not within the scope of the power of the Regional Transport Authority when it was dealing with grant of permits under section 48 read with section 57, for, at that stage what the Regional Transport Authority had to do was but to choose between the various applicants who may have made applica-

1. (1967) 2 S.C.W.R. 857.
2. (1963) 3 S.C.R. 523: A.I.R. 1963 S.C. 64.
3. (1968) 2 S.C.J. 74 : (1968) 1 S.C.R. 635.
4. C.A. No. 727 of 1965 (unreported).

tions to it under section 46 read with section 57. The Court expressed its view in the following manner :—

"In our opinion, that is not the stage where the general order passed under section 47 (3) can be re-considered, for the order under section 48 is subject to the provisions of section 47 which includes section 47 (3) under which a general order limiting the number of stage carriages etc., may have been passed. In other words, in exercising its power under section 57 the Regional Transport Authority is only considering whether the applications made before it are to be granted or not, and has to choose between various applicants where there are more applicants than the number of vacancies which might have been advertised or there are more applicants that the number limited under section 47 (3). The Scheme of the Act therefore is that a limit is fixed under section 47 (3) and the applications received are dealt with in the manner provided by section 57 and permits can be granted under section 48 subject to the limit fixed under section 47 (3). The view that we have expressed is borne out by the decision of this Court in *Abdul Mateen* v. *Ram Kailash Pandey*[1], wherein it was held that where a limit has been fixed under section 47 (3) by the Regional Transport Authority, and thereafter the said authority proceeds to consider applications for permits under section 48 read with section 57, the Regional Transport Authority must confine the number of permits issued by it to those limits and on an appeal or revision by an aggrieved person, the appellate Authority or the Revisional Authority must equally be confined to the issue of permits within the limits fixed under section 47 (3). In our opinion, the principle of this decision applies to the present case where the materials facts are almost similar in character."

On that view, the order of the State Transport Authority, was quashed.

In *R. Obliswami Naidu* v. *The Additional State Transport Appellate Tribunal, Madras*[2], which was decided by the Supreme Court in February, 1969, the Scheme of the sections was again considered. This was a case of a new route, and there was no prior order under section 47 (3). The appellant before the Supreme Court, applied to the Regional Transport Authority, Coimbatore for a permit to ply a stage carriage on the route. The application was published under section 57 (3). Certain operators made representations against the application on the ground that there was no need to grant a stage carriage permit for the route. The objection having been overruled, the appellant was granted a permit. An appeal against the order was allowed by the Additional State Transport Appellate Tribunal, on the view that the procedure adopted by the Regional Transport Authority was not in accordance with law, in as much as it had failed to determine the question of the need for a service in that route before entertaining the application for stage carriage permit. The High Court declined to interfere with the Tribunal's order, and the Supreme Court concurred with it. The Supreme Court while reviewing the relevant provisions, accepted the ratio of *Jaya Ram Motor Service* v. *Sri S. Rajarathinam and others*[3] and held :

"On an examination of the relevant provisions of the Act and the purpose behind sections 47 and 57, we are convinced that before granting a stage carriage permit two independent steps have to be taken. Firstly there should be determination by the Regional Transport Authority under section 47 (3) of the number of stage carriages for which stage carriage permits may be granted in that route. Thereafter applications for stage carriage permits in that route should be entertained. The Regional Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under section 47 (3)".

This is clear authority that without a prior order under section 47 (3), applications for stage carriage permits for the relevant route could not be entertained, and the Regional Transport Authority is not competent to grant stage carriage permits for more carriages than fixed under section 47 (3). This means that an order under section 47 (3) is a condition precedent to the exercise of power under section 48 (1).

1. (1963) 3 S.C.R. 523 : A.I.R. 1963 S.C. 64.
2. (1969) 2 S.C.J. 654 : (1969) 1 S.C.W.R. 569.
3. (1967) 2 S.C.W.R. 857.

read with section 57. Though *Abdul Mateen* v. *Ram Kailash*[1], was also concerned with a new route, there the Regional Transport Authority concerned started with a notification calling for applications for two permits, and the Supreme Court held that in such a case it should be deemed that there had been a decision under section 47 (3) fixing the limit of stage carriage at two. But in *R. Obliswami Naidu* v. *The Additional State Transport Appellate Tribunal*[2] there was no such notification calling for applications for any specified number of permits.

In *Sri Raja Rajeswari Bus Service* v. *Regional Transport Authority, South Arcot*[3], a Division Bench of this Court expressed the view :

> " Equally it will be open to the objector to state, where no limit has been fixed, that the route is well served or the condition of the road is such that more buses cannot ply on the road, etc., all germane and relevant considerations under section 47 (1). Such representations can quite properly find a place in the representations made, when called for, under section 57. The rule that where an inquiry under section 47(3) is necessary, it must precede the disposal of applications for permit on their merits, does not preclude the raising of all germane objections and relevant representations within the time prescribed. Once the objection raised and representations made, call for a determination under section 47 (3), under the rulings it is incumbent upon the Regional Transport Authority to take proceedings under section 47 (3) first before embarking upon the merits of the applications under section 57."

If by this observation, the Division Bench meant that even where there is no prior order under section 47 (3) applications for stage carriage permits on a route have been filed and are notified, and an objection is raised and found to be well-founded as to the absence of a prior order under section 47 (3), it would be open to the Regional Transport Authority to take proceedings under section 47 (3) separately, while keeping the proceedings under section 57 (3) pending and before embarking upon the merits of the applications, we are of the view that such a procedure would go against the tenor of the view of the Supreme Court in *R. Obliswami Naidu* v. *The Additional State Transport Appellate Tribunal, Madras and others*[2], that first there should be an order under section 47 (3) and only thereafter applications for grant of stage carriage permits could be entertained. The right course in such cases would be to dismiss the applications *in limine* on the ground that there had been no prior order under section 47 (3), and not keep the applications pending in order to await an order under section 47 (3).

It is then contended for the appellant that as the objection based on the absence of a prior order under section 47 (3) had not been raised before the Regional Transport Authority, neither the appellant before the Tribunal could be permitted to raise it before it for the first time in the appeal, nor would it be right for the Tribunal itself to take up the point and allow it on that ground. In our view, as we have held that without a prior order under section 47 (3) no application for a permit could be entertained for notification under section 57 (3), the absence of such an order goes to the root of the jurisdiction of the Regional Transport Authority to exercise its powers under section 48 (1) read with section 57. We, are, therefore, of the view that the point as to such an absence of a prior order could be raised at any stage of the proceedings under section 57 (3), or thereafter, and its admissibility at any further stage, should not be made dependent on representations in that regard having been made in time under section 57 (3). The representations contemplated by section 57 (3) pertain to matters specified in clauses (*a*) to (*f*) of section 47 (1), particularly those which bear on the selection of rival applicants for a permit. Once it is clear that section 47 (3) proceedings are different from, and independent of proceedings under section 57, and the latter would proceed only with reference to a prior order under section 47 (3), it follows that the representations and especially the question of adequacy in the context of selection of a proper operator for grant of a permit, cannot relate to considerations on which a decision

1. (1963) 3 S.C.R. 523 : A.I.R. 1963 S.C. 64.
2. (1969) 2 S.C.J. 654 : (1969) 1 S.C.W.R. 569.
3. (1969) 1 M.L.J. 201 : I.L.R. (1969) 2 Mad. 669 : A.I.R. 1969 Mad. 458.

as to limit under section 47 (3) is to be taken. But that is not to say, where proceedings under section 57 (3) have been initiated without there being a prior order under section 47 (3), no representations can be made as to the absence of such a earlier order, but only the failure to make such a representation will not conclude in further proceedings the question of there having been no earlier order under section 47 (3). From the stand point of *certiorari*, it was urged on the basis of *O.A.O. K. Lakshmanan Chettiar* v. *Commissioner, Corporation of Madras and another*[1], that the point should not be allowed to be taken for the first time in a petition under Article 226 of the Constitution. In that case, a Full Bench of this Court held that failure to object to jurisdiction before the lower Court was a bar to obtaining a writ of *certiorari*, whether the objection to jurisdiction is based on a pure point of law or based on facts which were or should have been within the knowledge of the applicant during the proceedings in the lower Court. That case was decided long before the Constitution came into force, and the position then was that this Court was following the practice of the King's Bench in England in *certiorari*, and on that hypothesis, rules laid down by the English Court in the decided English cases as to the scope and limitation of its jurisdiction in *certiorari* were applied. But that is not the case now, as Article 226 of the Constitution is of a much wider scope and confers powers on the High Court to make any direction including writs in the nature of *certiorari*. That was not a case of total want of jurisdiction, and on the facts, the Court proceeded on the basis that the objection as to jurisdiction could have been taken at the early stage, and the point having not been raised, *certiorari* could not issue *ex debito justitiae*. No doubt, this Court undoubtedly has discretion in *certiorari* petitions to exercise its power, or in any given circumstances. But in our opinion, in a case like this, where initial jurisdiction is totally wanting because of the absence of an earlier order under section 47 (3), this Court in the exercise of the discretion, will not be prepared to ignore the ground merely on the basis that it had not been taken at the earlier stages, and allow an order to continue in force, although it was made without such jurisdiction. Whether there was a prior order under section 47 (3) does not involve elaborate enquiry into facts, and is easily and readily found out. That the first respondent had participated in the contest for the permit before the Regional Transport Authority without raising objection of want of a prior order under section 47 (3) did not, therefore disentitle it from raising the point in its appeal before the Tribunal. Even if it had not raised the point in such an appeal, but raised, for the first time in *certiorari* or prohibition, in this Court, we would be prepared to entertain it in proceedings under Article 226 of the Constitution, and it would not be shut out from raising it.

One other point is, as to which of the applicants before the Regional Transport Authority would be entitled to reconsideration when the matter went back before it for disposal pursuant to the remit order by the Tribunal. On this question, we are of the view that the proceedings before the Regional Transport Authority should then be confined to only those who were parties to the appeals before the Tribunal, and those who failed before the Regional Transport Authority, but were content not to prefer appeals would not be entitled to participate any more, in the contest for permit, after the remit order. This principle should naturally have to be extended to proceedings under Article 226 of the Constitution as well. Those disappointed before the Tribunal, but did not question its orders by petitions under Article 226, or were not parties to proceedings under Article 226, should not be allowed to take advantage of an order of this Court in such proceedings and to have a fresh opportunity of entering into the contest. Our view on this matter seems to derive support from *Cumbum Roadways Ltd.* v. *Somu Transport Ltd.*[2].

An attempt was made before us to show with reference to an earlier traffic survey conducted that there was a fixation of limit on the route in question. We have verified the records in this respect, but find that there was no order under section 47 (3) relevant to the route. The appeal is dismissed with costs. Counsel fee Rs. 250.

V.M.K. ——— *Appeal dismissed.*

1. (1927) I.L.R. 50 Mad. 130 : 51 M.L.J. 742.
2. (1967) 1 S.C.J. 31 : (1967) 1 An.W.R. (S.C.) 17 : (1967) 1 M.L.J. (S.C.) 17 : (1966) 3 S.C.R. 7 : A.I.R. 1966 S.C. 1366.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. RAMAMURTI.

T. N. Ramachandra Naidu .. *Appellant* *

v.

T. R. Parameswaran Nair .. *Respondent.*

Transfer of Property Act (IV of 1882), *section* 108 (h)—*Lease of land—Lessee putting up superstructure—On determination of lease, if lessee does not remove superstructure, it becomes part of the land and property of the landlord—No formal transfer or conveyance necessary.*

Transfer of Property Act (IV of 1882), *section* 111 (e) *and* (f)—*Express surrender and implied surrender—Scope of.*

Madras Cultivating Tenants Protection Act (III of 1922), *sections* 3, 4, 9 *and* 12 *and Registration Act—Scope of—Tenant to be entitled to rights must continue to be a tenant of the land—Tenant loses the benefit by surrendering possession or entering into a new lease—No question of conveyance of superstructure by tenant to landlord, on tenant receiving compensation—Tenant merely gives up the right to remove superstructure—Declaration by tenant that he is not exercising his right to remove superstructure—Document does not require registration—Suit by tenant for declaration that he is entitled to right under the Act—Not maintainable.*

The rights of the landlord and the tenant will have to be determined with reference to the provisions of the Transfer of Property Act and the City Tenants Protection Act, the provisions of the latter Act prevailing wherever there is specific provision therein. Under the Transfer of Property Act, when land alone is leased, the lessee has no other right over the land except as a lessee and on the determination of the lease, the lessor becomes entitled to possession of the land. Under section 108 (*h*) of the Transfer of Property Act, on the determination of the lease, the lessee whilst in possession of the property leased can at any time remove the superstructure which the lessee has put up on the land and leave the property in the state in which the lessee received it. The lessee is the owner of the building put up by him on the land, and even so, his only right is to remove the superstructure. He has no right to compel the landlord to take the superstructure and pay the value thereof. Even with regard to this limited right of the lessee to remove the superstructure, there can be a contract to the contrary by which the lessee may agree not to exercise his right to remove the superstructure with or without any claim for compensation therefor. What is important to notice is that if the lessee does not exercise his right to remove the superstructure on the determination of the lease, the superstructure becomes part of the demised promises and thereafter if the lessee continues in possession as a tenant, he will be tenant of the land as well as of the building. In other words, if on the determination of the lease, the lessee does not remove the superstructure it becomes part of the land, and the property of the landlord, without any further conveyance or formal transfer of the superstructure from the lessee to the lessor.

The right of the tenant under the provisions of the City Tenants Protection Act, concerning the superstructure put up by him and the compensation thereof are to be found mainly in sections 3 and 4 of the Act. The tenant on ejectment will be entitled to be paid compensation or the value of the building erected by him which shall be determined by the Court in a suit for ejectment filed by the landlord and when the landlord makes the payment into Court, the amount of compensation declared by the Court, the tenant must put the landlord into possession of the land with the building. This right of the tenant to compel the landlord to take the superstructure and pay the value thereof is a statutory right conferred upon the tenant under this Act which right, the tenant is not entitled to, under the provisions of the Transfer of Property Act. Even so, the tenant cannot of his own accord initiate a proceeding compelling the landlord to take the superstructure and pay the compensation therefor. This right to claim com-

* S.A. No. 22 of 1966. 16th October, 1969.

pensation can be exercised by the tenant only if the landlord initiates a proceeding to eject the tenant. In a proceeding to eject the tenant, the tenant can exercise the option of claiming either the compensation for the superstructure under sections 3 and 4 or ask for a conveyance of the land itself as specified in section 9 of the Act after paying the market value determined by the Court. The difference is the language of section 4 and section 9 should be borne in mind. Where the tenant exercises the option of claiming the compensation for the superstructure no conveyance of the superstructure by the tenant to the landlord is contemplated. All that happens is, the tenant walks out, putting the landlord into possession of the land with the building, on receipt of compensation, while, where relief is afforded under section 9, on payment by the tenant of the price for the land determined by the Court, the landlord conveys to the tenant the extent of the land for which said price had been paid by the tenant and section 9 (3) also contemplates a regular conveyance with stamp duty and registration. The only departure which sections 3 and 4 make from the provisions of the Transfer of Property Act is that the tenant, under the City Tenants Protection Act is entitled to compel the landlord to take the superstructure, but even so, there is no conveyance of the same to the landlord. The very act of payment of the compensation makes the superstructure a part of the land demised as belonging to the landlord. The freedom of the parties to enter into a contract to the contrary within the meaning of section 108 of the Transfer of Property Act is, however, controlled by section 12 of the City Tenants Protection Act. It may now be taken as settled law that any stipulation by the tenant to surrender possession of the land with superstructure erected by the tenant or to accept as compensation any value other than the value to be determined under section 3 of the City Tenants Protection Act, will not be valid and in a proceeding for ejectment, the tenant will be entitled to insist upon either the conveyance of the land itself under section 9 or payment of the compensation to be determined in accordance with sections 3 and 4 irrespective of any contract to the contrary. So long as the tenant is in possession of the property as a lessee of the land, the tenant will be entitled to the protection under section 12 and insist upon his rights under section 3 and 4 or under section 9 at his option, even though he had entered into a contract to the contrary. For the tenant to continue to be entitled to the rights under section 3 and 4 or under section 9 as the case may be he must continue to be a tenant of the land. The tenant would lose the benefit of these provisions if he subsequently enters into a contract with the landlord either by way of entering into a new lease or by actually surrendering possession of the property to the landlord with or without compensation. The over-riding right of the protection under section 12 of the Act read with sections 3 and 4 or section 9 as the case may be, would avail the tenant only so long as he continues to be in possession of the land as lessee even though it may be after the expiry of the lease. What is crucial is his continuance must be as a lessee of the land. There is nothing in the City Tenants Protection Act which precludes a tenant from receiving satisfaction of his rights under the Act outside Court before any proceeding is initiated by the landlord.

The fact that the tenant continues in physical possession of the property without a break is not decisive. He may continue in possession but yet he may be under a different contract of lease either with regard to the property or with regard to the other terms of the tenancy.

Section 111 (*e*) and (*f*) merely embody the provisions of the English law except this difference that in the case of an express surrender, in England, it is required by the statute to be in writing. An express surrender consists in the yielding up of the lessee's interest to the lessor and it takes effect like an ordinary contract by mutual consent on the lessors acceptance of this act of surrender of the lessee. No technical words are necessary to effect a surrender and any form of words which will indicate the intention will be sufficient. In India, for an express surrender no such formality of a writing is necessary and a deed of surrender need not be registered if there are facts *de hors*.

The right of the tenant which stems from the statute is merely in the nature of a privilege or merely a right to purchase property which is not immoveable property so for as section 9 of the Act is concerned and so far as the superstructure is concerned, the right under section 3 and 4 of the Act is merely a right to compel the landlord to pay the tenant the value therefor and there is no question of a conveyance of the superstructure by the tenant to the landlord and when the tenant agrees to take up compensation either orally or in writing, the tenant merely gives up his right to remove the superstructure. There is no notion of a conveyance involved when the tenant works out his right under sections 3 and 4 of the Act, the Registration Act does not come into play at all.

Implied surrender is a surrender by operation of law which arises by the creation of a new relationship and this is necessarily implicit in the relinquishment of possession by the tenant. There is no difference between the Indian Law and the English law on this matter. Implied surrender by operation of law is as a result of the agreement between the landlord and the tenant that the term shall be put an end to followed by a change of possession. A surrender by operation of law is also implied when the tenant remains in occupation of the promises in a right and capacity inconsistent with the rights of the tenant under the prior lease. The principle in the same even in the case of a statutory tenancy. The doctrine of surrender by operation of law rests on the basic principle that acceptance of different and inconsistent interest in the demised promises cannot stand with the original lease and is further founded on estoppel which precludes the tenant frcm denying the title of the landlord.

On facts *held*, the arrangement embodied in Exhibit B-1 in substance is a declaration by the tenant that he is not exercising his right to remove the superstructure. Such a document does not require registration. The very fact of the respondent becoming a lessee of the superstructure involves a surrender by operation of law. A tenant is not entitled to maintain a suit for declaration that he is entitled to rights under section 3 and 4 or under section 9 of the City Tenants Protection Act.

Appeal against the Decree of the Additional City Civil Judge, Madras, in Appeal Suit No. 350 of 1964, preferred against the decree of the Court of the IV Assistant City Civil Judge, Madras in Original Suit No. 1717 of 1962.

A. Doraiswami Iyer, for Appellant.

P. C. Menon and *O. Radhakrishnan*, for Respondent.

The Court delivered the following

JUDGMENT.—The defendant who is the landlord is the appellant. About the year 1945, the plaintiff became a tenant of the defendant, of a small piece of vacant land 47′ x 21½′ and carried on business in sale of firewood, to quote his own words, "after putting up a firewood depot with zinc sheets covering the top and the sides and with casuarina poles but without any foundation nor walls." The plaintiff was paying Rs. 25 per month as rent for the site. By March, 1961, the arrears of ground rent came to Rs. 375 and the tenant passed a letter Exhibit B-2 dated 29th March, 1961, acknowledging that the arrears amounted to Rs. 375, that the same would be paid before the end of April, that in default the landlord should take and become the owner of the zinc shed and that the tenant would not raise any objection. The language employed in the letter is to make the landlord the owner of the superstructure if the tenant defaulted to pay the arrears by the end of April. The tenant did not pay the arrears by the 30th of April, 1961, but he passed a letter Exhibit B-1 dated 1st May, 1961, in favour of the landlord. That letter expressly recites that the arrears of Rs. 375 had not been paid as per Exhibit B-2, that the zinc shed was put in possession of the landlord on that day in discharge of the arrears of Rs. 375 and that the zinc shed, therefore, became the property of the landlord and the tenant would have no kind of right whatsoever with regard to the zinc shed. It is common ground that on the same day, *i.e.*, 1st May, 1961, the plaintiff became a tenant of the land together with the superstructure, agreeing to

pay Rs. 25 per month, that for two months he paid Rs. 50, that from July to October he was in arrears, that the landlord, therefore, issued a notice Exhibit B-3 dated 9th November, 1961, claiming the arrears of rent from the month of July to October, 1961 and also threatening the tenant with proceedings for eviction. The tenant sent a reply Exhibit B-4 dated 9th January, 1962, in which he admitted all the aforesaid facts and in particular, his having taken the land together with the shed on a rent of Rs. 25 on 1st May, 1961, his being in arrears from July to October. The tenant prayed for some time and also pleaded for reduction of rent to Rs. 15 per month thereafter. In this reply the tenant has assured the landlord that he would pay the arrears July to October as claimed within a very short time and prayed that in the interim no Court proceedings be taken against him and that he was passing that letter B-4 as proof of his *bona fides*. The tenant, however, did not keep up his promise and the landlord took proceedings under the Rent Control Act for evicting the tenant; the latter put forward a claim of title to the superstructure and the proceedings before the Rent Controller became infructous as the Rent Controller took the view that there was a *bona fide* dispute as to title. Shortly thereafter, the plaintiff, the tenant, brought the suit (out of which this second appeal arises) for a declaration that Exhibits B-2 and B-1 were signed by him without knowledge of their contents, that he is a Malayalee and did not know Tamil, that he never intended to give up his rights to the superstructure and his rights under the City Tenants Protection Act (hereafter referred to as the Act) and that in any event, the aforesaid documents would not operate as a conveyance of his rights over the superstructure as the documents are unregistered. Both the Courts concurrently found that the two letters were passed by the tenant fully knowing the contents and their implications. The Trial Court dismissed the plaintiff's suit holding that the two documents, Exhibits B-2 and B-1 did not require registration in the view that the zinc shed had no foundation and had no walls and no part of it was imbedded to earth. On this aspect, however, the lower appellate Court took the view that the zinc shed would amount to a building within the definition of section 2, sub-clause (6) of the Registration Act. It also took the view that the lease-hold right of the plaintiff was immoveable property and for that reason also the two documents required registration. In this view of the law, the lower appellate Court reversed the decision of the trial Court and upheld the claim of the tenant that the tenant's leasehold as well as his right to the superstructure would not in any manner be affected by the two letters. Hence the present appeal by the landlord.

The finding of the Courts below that the tenant passed all the three letters with full knowledge of their contents and their implications was not challenged, the only point stressed by Counsel on both sides related to the effect of the transaction as evidenced by Exhibits B-1 and B-2, whether they required registration and as to what exactly took place on 1st May, 1961. It is not in dispute that at the time of Exhibits B-1 and B-2, the tenant was entitled to protection under the Madras City Tenants Protection Act.

I may at once say that the decision of the lower appellate Court is wrong and unsustainable inasmusch as it has not considered the question for decision from a correct perspective and has not correctly appreciated the legal effect of the agreement evidence by Exhibit B-2 dated 1st May, 1961, and as to what took place on that date and the precise legal implications thereof.

Learned Counsel for the respondent urged (1) that the superstructure (zinc shed) which belonged to the tenant is immoveable property of value exceeding Rs. 100 and therefore without registration no title would pass to the landlord; (2) that the right of the tenant under the City Tenants Protection Act to get a conveyance of the land which undoubtedly would exceed Rs. 100 in value as well as the right of the tenant to claim compensation by his agreeing to the landlord taking the superstructure are rights and interests over immoveable property in two aspects and as under Exhibits B-1 and B-2 those rights had been relinquished and/or conveyed to the landlord, the two documents require registration as dealing with

rights in and interest over immoveable property. I see no substance in these contentions as they rest upon a truncated and restricted view of the two letters Exhibits B-1 and B-2 besides ignoring the true significance as to the manner in which the parties implemented that arrangement and the consequences of the change in the character of the tenant's possession of the property on and from 1st May, 1961. In my view, the events that took place on 1st May, 1961, clearly amount to an express surrender or in any event an implied surrender within the meaning of section 111, sub-clause (e) and (f) of the Transfer of Property Act and the tenant, after 1st May, 1961, would be estopped from contending that the landlord had not become the owner of the superstructure and he had no power to grant a lease of the building and the site treating himself as the owner of the same. The position will be the same even if the tenancy was one in which the tenant had the protection of a special tenancy legislation. The doctrine of surrender by operation of law or implied surrender are expressions used to describe the situation like the present where the law implies a surrender from unequivocal conduct of both parties which is inconsistent with the continuance of the existence of the prior tenancy. Such a surrender is an act of the law and takes place independently of and even in spite of the intention of the parties. It is presumed to have preceded the act to which the tenant is a party. The doctrine of implied surrender applies alike to contractual tenancies as well as tenancies protected by tenancy legislations meant for the protection of the tenants.

The rights of the landlord and the tenant will have to be determined with reference to the provisions of the Transfer of Property Act and the City Tenants Protection Act, the provisions of the latter Act prevailing wherever there is specific provision therein. Under the Transfer of Property Act, when land alone is leased, the lessee has no other right over the land except as a lessee and on the determination of the lease, the lessor becomes entitled to possession of the land. Under section 108 (h) of the Transfer of Property Act, on the determination of the lease, the lessee whilst in possession of the property leased can at any time remove the superstructure which the lessee has put on the land and leave the property in the state in which the lessee received it. The lessee the owner of the building put up by him on the land, and even so, his only right is to remove the superstructure. He has no right to compel the landlord to take the superstructure and pay the value thereof. (Vide *Sundareswarar Devasthanam* v. *Marimuthu*)[1]. Even with regard to this limited right of the lessee to remove the superstructure, there can be a contract to the contrary by which the lessee may agree not to exercise his right to remove the superstructure with or without any claim for compensation therefor. Vide *Dr. K.A. Dhairyawan* v. *J.R. Thakur*[2]. What is important to notice is that if the lessee does not exercise his right to remove the superstructure on the determination of the lease, the superstructure becomes part of the demised premises and thereafter if the lessee continues in possession as a tenant, he will be a tenant of the land as well as of the building. In other words, if on the determination of the lease, the lessee does not remove the superstructure it becomes part of the land and the property of the landlord, without any further conveyance or formal transfer of the superstructure from the lessee to the lessor.

As against this, the provisions of the City Tenants Protection Act may be examined. The right of the tenant concerning the superstructure put up by him and the compensation thereof are to be found mainly in sections 3 and 4 of the Act. The tenant on ejectment will be entitled to be paid compensation or the value of the building erected by him which shall be determined by the Court in a suit for ejectment filed by the landlord and when the landlord makes the payment into Court, the amount of compensation declared by the Court, the tenant must put the landlord into possession of the land with the building. This right of the tenant to compel the landlord to take the superstructure and pay the value thereof is a statutory right conferred upon the tenant under this Act which right, the tenant is not entitled to, under the provisions of the Transfer of Property Act. Even so, the tenant

1. I.L.R. (1963) Mad. 1054 : A.I.R. 1963 Mad. 369 at p. 372.

2. (1958) S.C.J. 1060 : (1959) S.C.R. 799 : A.I.R. 1958 S.C. 789.

cannot of his own accord initiate a proceeding compelling the landlord to take the superstructure and pay the compensation therefor. This right to claim compensation can be exercised by the tenant only if the landlord initiates a proceeding to eject the tenant. Vide *Mohanambal* v. *Selvanayaki*[1], where Srinivasan, J., has held that "the provisions of the Act do not contemplate the order determining compensation and directing its payment at any point of time anterior to the determination of the ejectment application itself." In a proceeding to eject the tenant, the tenant can exercise the option of claiming either the compensation for the superstructure under sections 3 and 4 or ask for a conveyance of the land itself as specified in section 9 of the Act after paying the market value determined by the Court. The difference in the language of section 4 and section 9 should be borne in mind. Where the tenant exercises the option of claiming the compensation for the superstructure, no conveyance of the superstructure by the tenant to the landlord is contemplated. All that happens is, the tenant walks out, putting the landlord into possession of the land with the building, on receipt of compensation, while, where relief is afforded under section 9, on payment by the tenant of the price for the land as determined by the Court, the landlord conveys to the tenant the extent of the land for which said price had been paid by the tenant and section 9 (3) also contemplates a regular conveyance with stamp duty and registration. The only departure which sections 3 and 4 make from the provisions of the Transfer of Property Act is that the tenant, under the City Tenants Protection Act is entitled to compel the landlord to take the superstructure, but even so, there is no conveyance of the same to the landlord. The very act of payment of the compensation makes the superstructure a part of the land demised as belonging to the landlord. The freedom of the parties to enter into a contract to the contrary within the meaning of section 108 of the Transfer of Property Act is, however, controlled by section 12 of the City Tenants Protection Act. It is unnecessary to refer to the earlier decisions on the point about the scope of the protection afforded to the tenant under section 12 of the Act after the recent pronouncement of the Supreme Court in *Vajrapani Naidu* v. *N.T.C. Talkies*[2], and the recent Bench decision of this Court to which I was a party, in *Subramania Iyer* v. *M.H.P. Fund Ltd.*[3]. It may now be taken as settled law that any stipulation by the tenant to surrender possession of the land with the superstructure erected by the tenant or to accept as compensation any value other than the value to be determined under section 3 of the City Tenants Protection Act, will not be valid and in a proceeding for ejectment, the tenant will be entitled to insist upon either the conveyance of the land itself under section 9 or payment of the compensation to be determined in accordance with sections 3 and 4 irrespective of any contract to the contrary. So long as the tenant is in possession of the property as a lessee of the land, the tenant will be entitled to the protection under section 12 and insist upon his rights under sections 3 and 4 or under section 9 at his option, even though he had entered into a contract to the contrary. In *Subramania Iyer* v. *M.H.P. Fund Ltd.*[3], the lessee agreed to erect the building on the site leased to him according to certain specifications and covenanted to surrender possession of the entire property including the superstructure on the expiry of the lease. The tenant agreed to receive only the value of the building then current or a sum of Rs. 5,000 whichever was less. The Bench held that such a stipulation would not be binding upon the tenant and deprive the tenant of his right to obtain a conveyance under section 9 of the Act. This Bench decision can be invoked by the teant in the instant case if the matter had stopped with the letter, Exhibit B-2, dated 29th March, 1961, by which the tenant acknowledged the arrears in the sum of Rs. 375 and agreed that if the same was not paid by the end of April, the landlord would be entitled to take and become the owner of the zinc shed and that the tenant would not raise any objection. For the tenant to continue to be entitled to the rights under sections 3 and 4 or under section 9 as the case may be, *i.e.*, at his option, he must continue to be a tenant of the land. The tenant would lose the benefit of these provisions if he subsequently enters into a contract with

1. (1961) 2 M.L.J. 261 at p. 262.
2. (1965) 1 S.C.J. 368 : (1965) 1 M.L.J. (S.C.) 47 : (1965) 1 An.W.R. (S.C.) 47: (1964) 6 S.C.R. 1015 : A.I.R. 1964 S.C. 1440.
3. I.L.R. (1966) 1 Mad. 381: (1965) 2 M.L.J. 140.

the landlord either bv way of entering into a new lease or by actually surrendering possession of the property to the landlord with or without compensation. The overriding right of the protection under section 12 of the Act read with sections 3 and 4 or section 9 as the case may be, would avail the tenant only so long as he continues to be in possession of the land as lessee even though it may be after the expiry of the lease. What is crucial is his continuance must be as a lessee of the land. There is nothing in the City Tenants Protection Act which precludes a tenant from receiving satisfaction of his rights under the Act outside Court before any proceeding is initiated by the landlord. The tenant may not like to purchase the land and the tenant may be content to receive some compensation, even though it may be less than what may be determined under section 4 and walk out of the land and if on the tenant so doing the landlord takes possession of the land and the superstructure, the tenant's right under the City Tenants Protection Act come to an end once for all. The landlord thereafter may lease the property, the land and the building together, to any third party or he may even grant a lease to the tenant himself and when the tenant is in possession thereafter, his possession is totally different, he is not a tenant of the mere land entitled to the protection of the Act, but he is an ordinary tenant of the land and the building to which the provisions of the Transfer of Property Act alone would apply. It is only where the terms of the tenancy are changed and a new tenancy comes into being, though in favour of the same tenant, that the doctrine of express or implied surrender comes into play. The operation or the applicability of that doctrine is not in any way controlled by the provisions of the City Tenants Protection Act.

The fact that the tenant continues in physical possession of the property without a break is not decisive. He may continue in possession but yet may be under a different contract of lease either with regard to the property or with regard to the other terms of the tenancy. In this context reference may be made to the decision of the Privy Council in *Ranganathan* v. *Ethirajulu*[1]. The landlord leased a plot of land for a period of 10 years from 1st December, 1912, with a liberty to the tenant to erect a superstructure. On 30th September, 1922, (shortly before the expiry of the ten years period) an agreement was arrived at by which the lessee was given a fresh lease at an enhanced rent, in order that further building operations may go on. A formal lease deed was executed on 1st February, 1923, in respect of the same plot of land for a further term of ten years from first October, 1922. The point raised was whether the physical possession of the tenant was attributable to a new tenancy taking effect from 1st of October, 1922, or whether the tenant was in possession under the original lease of October, 1912, because it is only in the latter case that the tenant would be entitled to the protection under the City Tenants Protection Act. The Privy Council held that the new tenancy came into being after 21st of February, 1922, when the Act came into force in the city of Madras. The argument that the possession of the tenant must be held to be attributable to the old tenancy was not accepted. The Privy Council observed as follows :

> "The appellants maintain that the tenancy which terminated on 30th September, 1932, was created by the lease of 1912, the lease of 1923 being merely a continuation of the earlier lease, and they refer to the verbal agreement made before the expiry of the 1912 lease in support of this argument. But their Lordships are clearly of opinion that, though the physical possession was continuous, the possession from 1st October, 1922, was attributable to a new tenancy, which was formally embodied in the lease dated 1st February, 1923, the increased rent thereby provided having been paid by them for 1st October, 1922, in terms of the verbal agreement for a lease. Their Lordships, accordingly, concur in the view of both the Courts below, that the tenancy here in question was not created before the commencement of the Act, and that the Act does not apply."

Section 111 (*e*) of the Transfer of Property Act deals with the determination of the lease by an express surrender as a result of the lessee yielding up his interest in

1. L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 : (1940) 1 M.L.J. 24 : A.I.R. 1940 P.C. 17.

pursuance of a mutual agreement between the lessor and the lessee and section 111 (*f*) deals with an implied surrender. These provisions merely embody the provisions of the English Law except this difference that in the case of an express surrender, in England, it is required by the statute to be in writing. An express surrender consists in the yielding up of the lessee's interest to the lessor and it takes effect like an ordinary contract by mutual consent on the lessor's acceptance of this act of surrender of the lessee. No technical words are necessary to effect a surrender and any form of words which will indicate the intention will be sufficient. In India, for an express surrender no such formality of a writing is necessary and a deed of surrender need not be registered if there are facts *de hors*. (Vide Mulla's Transfer of Property Act, 5th Edition page 735).

I may now refer to some of the decisions in which it was held that either no writing is necessary for a tenant to surrender the lease or, in a case where surrender was not evidenced by a document in writing as required by a particular statute, surrender was held to have taken place on the facts where the tenant had yielded up possession to the landlord. Under section 12 of the Madras Rent Recovery Act, Madras Act VIII of 1865, landlords are precluded from ejecting the tenants except by a decree of civil Court provided the tenants can always relinquish their lands by a writing signed by them in the presence of witnesses. In *Narasimma* v. *Lakhmana*[1], the tenant surrendered the unexpired portion of the lease without a document in writing and the landlord thereafter leased the property to some other tenant. The tenant filed a suit for restoration of possession on the ground that as there was no surrender in writing as required by the proviso to section 12 of the Rent Recovery Act, the tenancy must be deemed to be subsisting. This argument was not accepted. It was held that the section did not render wholly void and inoperative a surrender which although not reduced to writing has in fact taken place. It was pointed out that any other view would result in serious injustice to the landlord because the tenant may refuse to give a document in writing, may not cultivate the land at all and may give up the holding and the landlord would be helpless. In this view it was held that that it would always be open to the tenant to surrender by delivering possession to the landlord even without a document in writing. In *Bengal Coal Co.* v. *Monoranjan*,[2] the Bench of the Calcutta High Court had held that in India, the surrender or relinquishment does not require to be in writing, but can be inferred from the actions of parties. In the same volume in *Abdul Majid* v. *Hari Charan Halder*[3], it was held by a Bench of that High Court that a surrender by the tenant though for consideration was operative without a registered instrument to evidence the surrender. In that case, in execution of a rent decree, the tenant—judgment-debtor, surrendered the tenancy to the landlord, the latter agreeing to forego his claim for rents due. It was held that under section 111 of the Transfer of Property Act, under a mutual agreement, a surrender could be effected and it did not require registration. Reference may also be made to the decision of the Patna High Court in *Singheshwar Jha* v. *Ajab Lal*[4], in which it was held that a surrender by a tenant of occupancy right was valid even though the document was unregistered when there was other evidence to show that in fact there was a surrender. The earlier decision of the Patna High Court in *Jagdamba Prasad* v *Sham*[5], in which it was held that the deed of surrender need not be registered and a surrender can be proved by facts *de hors* the document was followed. All these decisions apply the principle of the early decision of the Privy Council in *Imambandi Begam* v. *Kamaleswari Pershad*[6], where the Privy Council has pointed out that even though there was no registered document, the surrender can be given effect to when there is proof of relinquishment of the possession.

Learned Counsel for the respondent placed considerable reliance upon the Bench decision of this Court reported in *Rangayya Appa Rau* v. *Kameswara Rau*[7]. In that case the tenant executed an unregistered deed of relinquishment surrendering his

1. (1890) I.L.R. 13 Mad. 124.
2. A.I.R. 1919 Cal. 694.
3. A.I.R. 1919 Cal. 840.
4. A.I.R. 1941 Pat. 142.
5. A.I.R. 1919 Pat. 13.
6. (1887) I.L.R. 14 Cal. 109 at p. 119 (P.C.).
7. (1897) I.L.R. 20 Mad. 367: 7 M.L.J. 71.

holding in favour of the Zamindar in consideration of the latter waiving his right to claim arrears of rent. The Bench held that even though, under section 12 of the Madras Rent Recovery Act, it would be open to a tenant to surrender his holding by a writing signed in the presence of witnesses (though unregistered), the document would require registration if the relinquishment was for consideration, *i.e.*, the waiver by the landlord to recover the arrears of rent. That case is easily distinguishable. The purport of the arrangement, Exhibit B-1 dated 1st May, 1961 in the instant case, is totally different. The lease is a monthly lease and all that had happened under Exhibit B-1 is to record that the lease has come to an end by 30th April, 1961. Under this document he is not relinquishing any right over immoveable property as in the case of relinquishment of occupancy rights. It is a monthly lease and nothing to prevent the landlord and the tenant to agree that the tenancy came to an end on the expiry of any particular month. Further what the tenant had done under Exhibit B-1 is not with respect to the vacant site leased to him, but the tenant has only stated that he will not exercise his right to remove the superstructure and the landlord himself can take the same. The arrangement embodied in Exhibit B-1 in substance is a declaration by the tenant that he is not exercising his right to remove the superstructure. Such a document does not require registration. If the relationship between the owner of the land and a third party who had put up a superstructure on that land is anything other than the relationship of a landlord and tenant, different considerations may arise. Even then, I am of the view that the right to remove the superstructure if relinquished by a document will not require registration. The position in the case of landlord and tenant is *a fortiorai* and clear because under section 108 (*h*) of the Transfer of Property Act, if the tenant does not remove the superstructure, whilst he is in possession, he loses the right and by force of section 108 (*h*), the superstructure becomes the property of the landlord. A careful perusal of Exhibit-B-1 shows that the tenant has given up his right to remove the superstructure. The legal position will be the same even when the City Tenants Protection Act applies.

In *S.M. Transports (P.) Ltd.* v. *Sankaraswamigal*[1], the Supreme Court had to consider the nature of the right of the tenant to purchase the land in question under section 9 of the Act. In that case, the Government first issued a notification notifying the town of Tanjore as coming within the purview of the City Tenants Protection Act but by a subsequent amendment, Madras Act XIII of 1960, the protection given to tenants of non-residential buildings in the municipal towns of Tanjore and certain other towns was withdrawn. On behalf of the tenant, it was argued that by the prior notification of the Government of Madras, the tenant had acquired valuable right to property and that the subsequent Act, Madras Act XIII of 1960, which deprived the tenant of that right was unconstitutional as infringing the fundamental rights under Article 14 read with Articles 19 and 31 of the Constitution. This argument was not accepted. The Supreme Court held that this statutory right to apply for the purchase of the land is not a right to property, that this is only in the nature of a contract to purchase property and does not create an interest in immoveable property and that this right which stems from a statute cannot expand its content or make it anytheless non-proprietary right. It is sufficient to extract the following observations :-

> "We now come to the last question, namely, whether the 1960 Act deprived the appellants of their right in property. To state it differently, the question is whether a tenant of a non-residential building in Tanjore had acquired a right of property under the 1955 Act and whether he was deprived of that right or otherwise restricted in the enjoyment thereof by the 1960 Act. The 1955 Act, as we have already noticed, conferred two rights on such a tenant, namely, (*i*) every tenant on ejectment would be entitled to be paid as compensation the value of any building erected by him, and (*ii*) such a tenant against whom a suit in ejectment has been instituted has an option to apply to the Court for an order directing the landlord to sell the land to him for a price to be fixed by the Court. We are not

1. (1964) 1 An.W.R. (S.C.) 146 : (1963) 1 S.C.R. (Supp.) 282 : (1964) 1 S.C.J. 530 : (1964) 1 M.L.J.(S.C.) 146 : A.I.R. 1963 S.C. 864.

concerned here with the rights conferred under section 3 of the Act, for the simple reason that neither of the appellants claimed a right thereunder. Both of them have taken proceedings only under section 9 of the Act and they have approached the High Court for a writ of *mandamus* that the petition should be disposed of under the provisions of section 9 of the Act. This Court's opinion on the question of the constitutional validity of the Act in so far as it deprived the appellants of their right under section 3 of the principal Act is not called for : that will have to be decided in an appropriate case. The question that falls to be considered is whether the second right, namely the right of a tenant to apply to the Court for an ordr directing the landlord to sell the land to him for a price to be fixed by it, under section 9 of the principal Act is a right to property. The law of India does not recognize equitable estates. No authority has been citcd in support of the contention that a statutory right to purchase land is, or confers, an interest or a right in property. The fact that the right is created not by contract but by a statute cannot make a difference in the content of the incidents of the right : that depends upon the nature and the scope of the right conferred. The right conferred is a right to purchase land. If such a right conferred under a contract is not a right of property, the fact that such a right stems from a statute cannot obviously expand its content or make it any the less a non-proprietary right. In our view a statutory right to apply for the purchase of land is not a right of property. It is settled law that a contract to purchase a property does not create an interest in immoveable property. Different consideration may arise when a statutory sale has been effected and title passed to a tenant : that was the basis of the judgment of this Court in *Jayvantsinghji* v. *State of Gujarat*[1], on which Mr. Viswanatha Sastry relied. But we are not concerned here with such a situation. It is said that the appellants have acquired a right under the 1955 Act to hold and enjoy the buildings erected by them by exercising their right to purchase the site of the said buildings and that the impugned Act indirectly deprived them of their right to hold the said buildings. This argument mixes up two concepts, namely, (*i*) the scope and content of the right, and (*ii*) the effect and consequences of the deprivation of that right on the other properties of the appellants. Section 9 of the principal Act, extended by the 1955 Act, only confers a right in respect of the land and not of the superstructure. If that Act held the field, the appellants could have purchased the land, but by reason of the 1960 Act they could no longer do so. Neither the 1955 Act conferred any right as to the superstructure under section 9 of the principal Act nor did the 1960 Act take that right away. If this distinction between the land and the superstructure is borne in mind the untenability of the argument would become obvious."

The principle of this decision was followed and applied by Natesan, J., in a decision reported in *Natesa Mudaliar* v. *S.B.K.P.K. Bhajana Matam*[2]. The learned Judge has held that the right to exercise an option under the statute is merely a privilege conferred on the tenant and the tenants' right cannot be regarded as right to property—*Vide* observations at page 136.

I may also refer to the decision of the Privy Council in *Abbott* v. *Minister for Lands*[3]. In that case the appellant purchased certain area of Crown land in the county of Brisbane and the sale was carried out under section 25 of the Crown Lands Alienation Act of 1861. Later on, under section 22 of the Act, he applied for the sale of further extent of land adjoining the land which he purchased under section 25. There was a conditional purchase within the meaning of section 22 of the Act. In 1884, the Crown Lands Act of that year was passed and by section 2, the Crown Lands Act of 1861 was repealed subject to a saving provision. The Act of 1884 did not contain a similar provision or the counter part of section 22 of the Act of 1861, there being no provision relating to the conditional purchase of adjoining lands by a holder in fee simple of lands granted by the Crown. It was perhaps a matter of policy and such holders were excluded from the purview of the Act of 1884. The argument

1. A.I.R. 1962 S.C. 821.
2. I.L.R. (1967) 1 Mad. 414 : (1966) 1 M.L.J. 130 at 136.
3. L.R. (1895) Appeal Cases, 425.

on behalf of the appellant was that the following proviso in the Act of 1884 preserved the right of the appellant under the Act of 1861.

> "Provided always that notwithstanding such repeal—
>
> (*b*) All rights accrued and obligations incurred or imposed under or by virtue of any of the said repealed enactments, shall subject to any express provisions of this Act in relation thereto remain unaffected by such repeal."

The contention was that the right to make the additional conditional purchase was a right accrued at the time when the Act of 1884 was passed and remain unaffected despite the repeal of the Act of 1861. The Privy Council observed as follows :

> "They think that the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by individual members availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment"

From the foregoing it will be seen that the right of the tenant which stems from the statute is merely in the nature of a privilege or merely a right to purchase property which is not immoveable property so far as section 9 of the Act is concerned and so far as the superstructure is concerned, the right under sections 3 and 4 of the Act is merely a right to compel the landlord to pay the tenant the value therefor and there is no question of a conveyance of the superstructure by the tenant to the landlord and when the tenant agrees to take compensation either orally or in writing, the tenant merely gives up his right to remove the superstructure. There is no notion of a conveyance involved when the tenant works out his right under sections 3 and 4 of the Act and the Registration Act does not come into play at all. As observed already, there is nothing in the Act which precludes the tenant from entering into a final settlement with the landlord with regard to the value of the superstructure and accept some agreed compensation. After that stage is reached, the tenant cannot claim any right under the Act.

It only remains to deal with the aspect of implied surrender arising under section 111 (*f*) of the Transfer of Property Act which completely supports the case of the landlord. Implied surrender is a surrender by operation of law which arises by the creation of a new relationship and in this is necessarily implicit in the relinquishment of possession by the tenant. There is no difference between the Indian Law and the English law on this matter. Implied surrender by operation of law is as a result of the agreement between the landlord and the tenant that the term shall be put an end to followed by a change of possession. Familiar instance of a surrender by operation of law is when the tenant takes a new lease from the landlord to commence during the term of the old lease or by consent putting an end to the old lease and the tenant taking a new lease. The landlord has no power to grant the new lease except upon the footing that the old lease is surrendered, and the tenant being a party to the grant of the new lease, would be estopped from denying the surrender. Consequently the acceptance of the new lease operates as a surrender of the old one, *Vide* 23, Halsbury's Laws of England, Third Edition, paragraphs 1414 and 1415. A surrender by operation of law also is implied when the tenant remains in occupation of the premises in a right and capacity inconsistent with the rights of the tenant under the prior lease. The principle is the same even in the case of a statutory tenancy. A statutory tenancy can come to an end either when the tenant gives up possession by agreement or changes the character of his occupation or enters into a new contractual tenancy—*Vide* 23, Halsbury's Laws of England, Third Edition paragraph 1589 at page 810. Reference may also be made to the following statement of the law, in Woodfall Landlord and Tenant, Volume I, Twentyseventh Edition (1968) at pages 862 and 863 :

> "*The principle of surrender by operation of law.*
>
> The term "surrender by operation of law" or "implied surrender" (there being no distinction) is the expression used to describe all those cases where the

law implies a surrender from unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy. Thus it is properly applied to cases where the owner of a particular estate has been party to some act having some object other than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing. Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties. It is presumed to have a *preceded* the act to which the tenant is a party.

Surrenders by operations of law are excepted from the requirement of a deed (Law of Property Act 1925, section 52).

Surrender by acceptance of a new lease. Of this sort are surrenders created by the acceptance of a new lease from the reversioner to begin at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease and operates as a surrender thereof by act and operation of law, but not if the second lease be void or voidable. Though an agreement for a future lease does not itself operate as a surrender by operation of law, it would seem necessarily to imply an agreement to surrender the existing lease, so that the practical result will probably be the same. The reason why such acceptance of a new lease operates as a surrender of the first is that the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, which would not be valid if the first lease continued to exist. He would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first.

Such a surrender is subject to an implied condition that the new lease is good, and that if it be not so, the old lease remains in force."

I may also refer to the following statement of law in Hill and Redman's Law of Landlord and Tenant, Fourteenth Edition, page 492, paragraph 385 :—

"*By grant of new lease to tenant.*

A surrender by operation of law takes place when the lessee takes a new lease from the lessor to commence during the term of the old lease, even though the new lease is for a shorter term then the residue of the old term. This surrender is founded upon estoppel, and takes place without regard to the intention of the parties. The lessor has no power to grant the new lease except upon the footing that the old lease is surrendered, and the lessee, being a party to the grant of the new lease, is estopped from denying the surrender. Consequently the acceptance of the new lease operates as a surrender of the old one; and the result is the same although the new lease is a future lease, or although the new lease is by parol and the old lease was by deed. But it is essential to such a surrender that the new lease should be valid and should take effect at once as a lease; hence, there is no implied surrender by the acceptance by the lessee of a new lease which is void, or which is voidable and is in fact avoided; or by a mere agreement for a new lease unless, perhaps, it is one which is capable of being specifically enforced.

Where a tenancy if contractual would have been surrendered by operation of law the fact that it is a statutory tenancy will not prevent a surrender from taking place on the grant of a new tenancy. A person in possession as statutory tenant may thus be turned by agreement into a contractual tenant.

Any arrangement between the landlord and tenant which operates as a fresh demise will work a surrender of the old tenancy; and this may result from an agreement under which the tenant gives up part of the premises and pays a diminished rent for the remainder, provided a substantial difference is thereby made in the conditions of the tenancy. But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end.

It seems that a fresh demise is not essential to the surrender, and that there is a surrender by operation of law where the former tenant is allowed to occupy the premises rent free, *i.e.*, he is granted a licence to occupy the premises rent free."

From the above discussion it will be seen that the doctrine of surrender by operation of law rests on the basic principle that acceptance of different and inconsistent interest in the demised premises cannot stand with the original lease and is further founded on estoppel which precludes the tenant from denying the title of the landlord.

Reference may next be made to the decision in *Foster* v. *Robinson*[1], in which the doctrine of implied surrender by operation of law was applied even in the case of a tenancy protected by the Rent Restriction Acts in England. In that case, the owner who was managing a farm let a cottage near by to a man who was wrorking in the farm at a particular rent per half year. Some years thereafter the tenant on account of age and infirmity could not work in the farm. The landlord and the tenant agreed that the existing tenancy would cease and that the tenant could live in the cottage rent-free till he died. The tenant lived in the cottage rent free without paying any rent till he died. The tenant's daughter was living with her father for many years and on her father's death it was contended that she was entitled to remain in the cottage paying the old rent. The landlord took proceedings to recover possession and it was held that he was entitled to possession on the ground that the original tenancy had, as a result of the arrangement in 1946, been surrended by operation of law and that this was so although the tenancy was one to which the Rent Restriction Act had applied. Evershed, Master of the Rolls, dealt with the matter in the following manner:

"The question in the present case is whether, on the facts as found by the county Court Judge (leaving aside for the moment any question of the Rent Acts), there are circumstances supervening to prevent the tenant from denying that the old relationship has been superseded by the new. If there is a new arrangement which the tenant is asserting by his conduct then he is estopped from denying that the landlord was capable of entering into that new arrangement; and, if the new arrangement could not be entered into while the old agreement subsisted, it follows that the tenant is equally prevented from denying that the old agreement has gone.

* * * *

It is not a question of mere agreement here; there were here an agreement and superadded acts in pursuance of the agreement sufficient to show that effect in the fullest sense was given to the agreement, the new agreement being inconsistent with the continuation of the old tenancy I therefore consider that, unless the matter is affected otherwise by the Rent Restriction Acts, there is no good ground for saying that this case on the facts as found would not suffice to produce a surrender by operation of law."

Rejecting the argument that this doctrine of implied surrender cannot be applied in the case of a building controlled by Rent Restriction Act, the learned Master of the Rolls observed as follows at page 157:

"That, however, is not this case, Another instance of the sort of transaction which might occur was put by my brother Singleton early in the argument. A landlord may say to a tenant: "You are getting on in years. I am grateful to you for all you have done and I am quite willing to have the present tenancy put an end to and to allow you to remain on as my licensee for the rest of your life without paying rent. That will give me the advantage, if I survive you, that after your death I shall be able to get vacant possession; but I shall not be able to disturb your occupancy during your life. Alternatively, you can stay on as you are, I may try to get rid of you if I can provide alternative accommodation. But otherwise the right that you will enjoy will persist in favour of your daughter or whoever else may under the Act be entitled to it after your death. Which do you

1. L.R. (1951) 1 K. B. 149.

prefer?" Suppose that the tenant says that he prefers the former of the two offers which will enable him to spend his life in the house without paying any more rent: if that were given effect to by a carefully drawn agreement, it is very difficult to suppose that the Court would feel bound to disregard it."

Singleton, Lord Justice, repelled the argument that to infer an implied surrender by operation of law in such cases would defeat the provision of the Rent Restriction Act in the following terms:

"It was urged on us that to uphold this judgment would be to open wide a door enabling people to defeat or to get round the provisions of the Rent Restriction Acts. I do not take that view. I regard this as a case in which the landlord acted perfectly properly and in the interests of the occupier. Not a word can be said against him. Although county Court Judges who have these matters before them obviously must be careful before they find an agreement of this kind, I do not think that this Court ought to hesitate to uphold this judgment in favour of a landlord who was acting, as I think, in the best interests of the occupier of the house. It is for the county Court Judge to find the facts and he has done that in a careful judgment. He came to the conclusion that from May, 1946, the occupier was not a tenant at all. I agree with that finding. The position of the defendant's father was altered by agreement between the parties; there was a complete change; the father became a licensee, and could not have been heard to say that he was anything more than that. He had had the advantage of the agreement and had paid no rent for three and a half years."

The principle of this decision was followed and applied in a later decision in *Rogers* v. *Hyde*[1], Lord Asquith stated the law in these terms:

If the preceding tenancy was contractual, this is obvious: If it was a statutory tenancy, there is recent and binding authority for the proposition that a contractual (and non-protected) tenancy can replace a statutory tenancy by a notional surrender and regrant or by other means: *see*, for instance, *Foster* v. *Robinson*[2] a case recently decided by the Court of appeal."

In *The Bungalows, Ltd.* v. *Mason*[3], the same view was taken that the position of a statutory tenant could by agreement be converted into that of a contractual tenant at the same time attracting the doctrine of implied surrender.

The principle of the abovesaid decisions was applied and followed in a later decision reported in *Collins* v. *Claughton*[4]. In that case the defendant who was a statutory tenant in a dwelling house governed by the Rent Acts, wrote a letter to the lessor that the tenant had come to an agreement with his wife that the tenancy may be changed in the rent book in her name and that the rent in future would be paid by his wife. The landlord agreed to this arrangement, the tenancy was changed in the name of the wife who paid the rent instead of the defendant. About a year later, the wife left her husband who continued in occupation of the premises. Immediately after the wife left her house the wife gave notice to the landlord that she was terminating the tenancy and thereupon the defendant, the husband, offered to pay the rent. But the landlord refused and commenced proceedings claiming possession of the premises. It was held that the arrangement by which the tenancy was changed in the name of the wife operated as implied surrender of the statutory tenancy and the creation of a new tenancy. It was also held that there was nothing in the Rent Act which made a pre-requisite for the surrender of a statutory tenancy that there should be a giving up of physical possession.

In a recent decision of the Andhra Pradesh High Court in *Munuswamy* v. *Muniramiah*[5], the doctrine of surrender by operation of law by a tenant taking a new lease was discussed and it is sufficient to refer to the following observations at page 169.

"An express surrender effectuates the clear and unambiguous intention of the lessee to 'surrender and yield up' his leasehold to the lessor. It is therefore a

1. L.R.(1951) 2 K.B 923 at p. 930.
2. (1951) 1 K.B. 149.
3. (1954) 1 All E.R. 1002.
4. (1959) 1 All E.R. 95. (1959) 1 W.L.R. 145.
5. (1964) 2 An.W.R. 304 : A.I.R. 1965 A.P. 167.

matter of intention of the parties and not a matter of implication of the law. But in an implied surrender, an intention to surrender is not expressed. It is inferred by the law. An implied surrender is an act of the law and takes place independently of, and in some cases even in spite of, the intention of the parties. The law infers such surrender from the act and conduct of the parties. 'Thus it is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing'. (See *Lyon* v. *Reed*[1], and *Bessell* v. *Landsberg*[2].

A familiar instance of a surrender by operation of law is when the tenant takes a new lease from the landlord to commence during the term of the old lease. Here the tenant does not express his intention to surrender and determine the old lease. But by his taking a new lease, the law infers a termination of the existing lease. The reason is that the landlord has no power to grant the new lease except upon the footing that the old lease is surrendered ; and the tenant, being a party to the grant of the new lease, is estopped from denying the surrender. This is how surrender by operation of law comes about."

Vide also statement of law in Mulla's Transfer of Property Act, 5th edition, at page 735.

The principle of the above cases clearly applies to the instant case. From the foregoing it will be seen that the very fact of the respondent becoming a lessee of the superstructure involves a surrender by operation of law.

It may also be added that a tenant is not entitled to maintain such a suit for declaration that he is entitled to rights under sections 3 and 4 or under section 9 of the City Tenants Protection Act. (Vide *Sundareswarar Devasthanam* v. *Marimuthu*[3].

For all these reasons the appeal is allowed and the suit is dismissed with costs in the Courts below. Appellant will be entitled to restitution if he had paid costs to the respondent. There will be no costs in the second appeal.

No leave.

S.V.J. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM AND MR. JUSTICE K. N. MUDALIYAR.

P. L. N. Paramasivam .. *Appellant**

v.

P. K. Ramaswami Gounder and others .. *Respondents.*

Hindu Law—Hindu undivided family not owning joint or ancestral property—A member of the family throwing his self-acquired property into the family hotchpot—Effect—Self-acquired property, if impressed with joint family character—Deed purporting to be partition deed among the members of the family, if makes division a family arrangement in respect of joint family property.

Transfer of Property Act (IV of 1882), *sections* 10 *and* 11—*Scope—Deed of gift—Absolute vested interest in favour of the plaintiff and the defendants, but subject to the restrictions on alienations by them—Restrictions partial or absolute—Restrictions if void.*

One Narayana Pillai had some ancestral properties. They were sold and the small amount which was received by him by the said sale was also spent for family expenses then itself and only after that, Narayana Pillai acquired properties by doing business. The said Narayana Pillai and the members of his family entered into the registered partition deed Exhibit A-1 dated 15th October, 1958.

1. (1844) 13 M. and W. 285.
2. L.R. (1845) 7 Q. B. 638.
3. I.L.R. (1963) Mad. 1054 : A.I.R. 1963 Mad. 369.

* Appeal No. 698 of 1963. 21st November, 1969.

Is Exhibit A-1 really a partition deed as styled in the document or a deed of family arrangement?

Held: Property which was originally self-acquired may become joint family property, if it has been voluntarily thrown by the owner into the joint stock with the intention of abandoning all separate claims upon it. The mere fact that Narayana Pillai agreed to effect a partition of his properties with the other members of his family cannot lead to the inference that the properties dealt with under Exhibit A-1 are joint family properties. A scrutiny of the terms of Exhibit A-1 does not disclose any intention on the part of Narayana Pillai to impress his self-acquired properties with the character of joint family properties. It is true that he could express his intention to treat the properties dealt with under Exhibit A-1 as joint family properties even under the very document and proceed to effect a partition among the members of his family. But there is no such declaration by him in the partition deed. The mere fact that the document Exhibit A-1 is styled as a deed of partition, though a relevant circumstance, is not decisive on the question whether it is really a deed of partition. It is true the sons and grandsons were parties to the document and consented to the shares being given to the daughters of Narayana Pillai. But, he did so merely to comply with the request of his children and grand-children and relations to effect a division as decided by him. Again, it could not be pretended that there was any *bona fide* dispute between Narayana Pillai and his children and grand children when he divided and gave his property to them under Exhibit A-1. In this way, it is clear that, though Exhibit A-1 purports to be a partition deed it is really a gift deed by Narayana Pillai in favour of the members of his family.

Can the restrictions as to alienation and enjoyment be supported on the ground that they are not absolute, but partial?

Held, also that, under Exhibit A-1, Narayana Pillai has reserved a life interest in the suit properties and given absolute vested interest in favour of the plaintiff and defendants 3 to 6 in the said properties and specified their shares. After giving absolute vested interest in the suit properties to the plaintiff and defendants in the suit, Narayana Pillai has imposed an absolute restraint prohibiting them from alienating their shares by way of sale, etc. The words 'all persons' in the relevant clause refers not only to the plaintiff and defendants 3 to 6, but also to their sons, grandsons etc., who are to succeed to their properties. Even if it is construed as restricting alienations by the plaintiff and defendants 3 to 6, it is an absolute restraint which is invalid. The restraint imposed is clearly an absolute restraint which is void under section 10 of the Transfer of Property Act.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore dated 30th November, 1962 in Original Suit No. 259 of 1961.

A. R. Ramanathan, for Appellant.

R. Gopalaswami Ayyangar, V. Vedantachari, T. Rangaswami Ayyangar, and *K. Srinivasan*, for Respondents.

The Judgment of the Court was delivered by

Sadasivam, J.—This appeal by the plaintiff in O.S. No. 259 of 1961, on the file of the Subordinate Judge's Court, Coimbatore, relates to the site, building, machinery, furniture, etc. of a cinema theatre known as 'Narayana Talkies" in Pollachi, more fully described in the plaint schedule. Narayana Pillai, the father of the plaintiff and the third defendant and the paternal grandfather of defendants 4 to 6, leased the theatre to the second defendant and his partner one Muthuswami Gounder for a period of seven years from 1st November, 1949, under a lease deed dated 19th October, 1949. The interest of Muthuswami Gounder devolved on defendants 1 and 2 on the dissolution of the partnership. On 24th March, 1956, Narayana Pillai entered into an agreement with defendants 1 and 2 for granting an extension of the lease of the theatre for a further period of five years. But subsequently Narayana Pillai instituted the suit O.S. No. 175 of 1958, on the file of the

Sub-Court, Coimbatore, against defendants 1 and 2 for recovery of possession of the cinema theatre. Defendants 1 and 2, in their turn, filed O.S. No. 227 of 1958 on the file of the Sub-Court, Coimbatore, for specific performance of the agreement dated 24th March, 1956 for extension of the lease for five years. It is during the pendency of these suits Narayana Pillai and the members of his family entered into the registered partition deed Exhibit A-1 dated 15th October, 1958. Subsequently Narayana Pillai died. On 18th November, 1959, defendants 1 and 2 took a lease of the suit properties from the present plaintiff and defendants 3 to 6 under Exhibit A-2 for the unexpired portion of five years mentioned in the agreement on 24th March, 1956, namely, one year, eleven months and thirteen days and thus the above two suits were compromised. On 26th February, 1960, defendants 4 and 5 sold their one-fourth share of the suit properties to defendants 1 and 2 under Exhibit B-1. On the same date, the third defendant sold his one-fourth share in the suit properties to defendants 1 and 2 under Exhibit B-2. On 17th April, 1960, the sixth defendant, who was mentally unsound and was represented by his mother, leased his share in the suit properties to defendants 1 and 2. In R.C.O.P. No. 34 of 1961 defendants 1 and 2 unsuccessfully invoked the jurisdiction of the Rent Court for depositing the rents due to the appellant-plaintiff. The appellant-plaintiff filed the present suit to recover possession of the suit properties together with damages at the rate of Rs. 2,500 per month for use and occupation.

The learned Subordinate Judge found that the document Exhibit A-1, though styled a deed of partition, is really a deed of gift, that the clauses and conditions in the deed Exhibit A-1 as regards the restraint on alienation and the mode of enjoyment are not valid and binding on the defendants and cannot be enforced after the lifetime of Narayana Pillai, that by virtue of the execution of the lease deed Exhibit A-2 the plaintiff (appellant) has abandoned his rights to recover possession of the suit properties under Exhibit A-1 and is also estopped from doing so, that the suit is not maintainable without setting aside the alienations made by defendants 3 to 5 that the order of the Rent Controller in the proceedings taken by defendants 1 and 2 cannot operate as *res judicata* in these proceedings and in the result dismissed the suit with the costs of defendants 1 and 2. Hence the plaintiff has preferred this appeal.

Though the sixth defendant filed a written statement on the same lines as defendants 3 to 5 denying the plaintiff's claim, he now supports the claim the appellant-plaintiff, as the lease granted by him has expired and he has filed a suit to establish his rights to his share of the suit properties.

The main question for consideration in this appeal is whether Exhibit A-1 is really a partition deed as styled in the document, or in the alternative, a deed of family arrangement, as contended by the learned Advocates for the appellant (plaintiff) and the sixth respondent (sixth defendant), or whether it is really a deed of gift by Narayana Pillai in respect of his self-acquired properties to the several members of his family as put forward by the contesting respondents 1 and 2 (defendants 1 and 2) and found by the trial Court. The decision on the question depends upon a proper construction of the relevant terms of the document Exhibit A-1. In the absence of any oral evidence in this case, we have to rely on the statements of fact found in the document. The executants of Exhibit A-1 are Narayana Pillai, his daughters Thillai Ammal, Thayammal, Alamelu Ammal, Ambujavalli and Ayyammal, his sons Paramasivam (Plaintiff) and Arunachalam (third defendant) and his grand sons Thirugnanam fourth defendant and Kandaswami—fifth defendant both (through his son Venkatachalam Pillai) Venugopal—sixth defendant (through his son Varadaraja Pillai) and Balasubramaniam (through another of his daughters). Narayana Pillai reserved a life interest for himself in the suit properties which are described as the A schedule in Exhibit A-1, and divided the vested remainder into four shares and gave one share to the plaintiff, one share to the third defendant, one share to defendants 4 and 5 and one share to the sixth defendant, subject to certain restrictions as to alienation and enjoyment. He has divided the rest of

his properties among his sons, daughters and grand-children, who are parties 2 to 12 in Exhibit A-1. He has given the F Schedule properties in Exhibit A-1 to his grandsons Thirugnanam and Kandasami. But he has given to each of the other parties to Exhibit A-1 separate properties as described in schedules B to E and G to K. Under the terms of Exhibit A-1, the parties get only a life interest in the properties described in Schedules B to K of Exhibit A-1. In respect of the C Schedule properties allotted to Thayammal, it is the plaintiff and defendants 3 to 6 who get the A. Schedule properties, who are entitled to life interest in the C Schedule properties after the life-time of Thayammal, and it is their heirs who are entitled to the vested remainder. In respect of the properties described in the other Schedules B and D to K, the heirs of the persons who take life interest in the said properties are entitled to the vested remainder. Though it is stated in the document that Narayana Pillai effected a division by casting of lots, it appears from the several Schedules B to K that his sons and daughters are not given equal shares. The value of share allotted to each of the daughters is very much less than the value of the share allotted to each of the sons and there is no equality in the value of the shares either among the sons, or among the daughters. It is recited in the document that a division of all the movable properties among the parties had already been effected and if there are slight differences in the value of the properties allotted to each party, such difference shall be borne by the respective individuals. In the second paragraph of Exhibit A-1, Narayana Pillai has stated that though he got a few items of ancestral properties, they were sold and the small amounts received by him were spent for family expenses and it is only thereafter he acquired the properties dealt with by him under Exhibit A-1 by doing business. He has further mentioned in Exhibit A-1 that he had executed several wills and that the last will executed by him was one dated 13th July, 1958. He has also referred to the fact that he had settled some of the properties in favour of Thillai Ammal vagaira and subsequently cancelled the same. It appears from the document that the children, grand-children and certain other relatives of Narayana Pillai requested him to effect a division of his properties according to his wish, that he effected a division by casting lots and that the parties agreed to the division effected by him. It is clear from a reading of Exhibit A-1 that Narayana Pillai has dealt with his properties as his self-acquired properties in giving shares to his sons, daughters and grandchildren.

Sri Vedantachari relied on some of the recitals in Exhibit A-1 in support of his contention that it was really a partition of joint family properties. He laid stress on the fact that Narayana Pillai had some ancestral properties. But it is clear from the document that the said properties were sold and the small amount which was received by Narayana Pillai by the said sale was also spent for family expenses then itself and only after that, Narayana Pillai acquired properties by doing business. The parties to the suit are parties to the document and there is no plea or evidence to support the contention of the learned Advocates for the appellant and the sixth respondent that the properties covered by Exhibit A-1 are joint family properties. It is not the case of the appellant or the sixth respondent that the properties dealt with under Exhibit A-1 were acquired with the aid of ancestral nucleus or that they were blended with joint family properties. In fact there could be no blending of the properties acquired by Narayana Pillai with any of his ancestral properties as the ancestral properties were alienated prior to the acquisition of properties by Narayana Pillai. The recital in Exhibit A-1 that a division of all kinds of movable properties had already been effected among the parties to Exhibit A-1 would not show that the movable properties so divided belonged to the joint family of Narayana Pillai, his sons and grandsons. It is quite possible that Narayana Pillai allowed the other members of his family to take shares in his moveable properties just as he allowed them to take shares in his immovable properties under Exhibit A-1. The mere fact that Narayana Pillai agreed to effect a partition of his properties with the other members of his family cannot also lead to the inference that the properties dealt with under Exhibit A-1 are joint family properties. It is significant to note that Narayana Pillai has given shares to his daughters, who were

all married at that time. In *Natesan* v. *Commissioner of Income-tax*[1], it has been held by a Bench of this Court that in a partition amongst the members of a Hindu undivided family governed by the Madras School of Mitakshara Law, the wife and the unmarried daughters will not have any right to be allotted a share. At least, an unmarried daughter can claim maintenance till marriage and provision for marriage expenses, but no such claim can be made by married daughters.

Property which was originally self-acquired, may become joint family property, if it has been voluntarily thrown by the owner into the joint stock, with the intention of abandoning all separate claims upon it. In Mayne's Treatise on Hindu Law and Usage at page 348 para. 283 this doctrine has been referred to and it is pointed out that it has been repeatedly recognised by the Privy Council. It is stated in the same paragraph that "the question whether a coparcener has done so or not, is entirely one of fact, to be decided in the light of all the circumstances of the case; but a clear intention to waive his separate rights must be established and will not be inferred from acts which may have been done merely from kindness or affection." The judgment in *Shiba Prasad Singh* v. *Prayag Kumari Devi*[2], is quoted as authority for the said doctrine in the foot-note 'Q' at page 348 of the book. According to the judgment of the Privy Council in that case delivered by Sri Dinsha Mulla, the doctrine of blending or throwing into the common stock is based on the text of Yagnavalkya that "in cases where the common stock undergoes an increase, an equal division is obtained." In his commentary on this text Vigyaneshwara has observed as follows:

> "Among unseparated brothers, if the common stock be improved or augmented by any one of them through agriculture, commerce or similar means, an equal distribution nevertheless takes place; and a double share is not allotted to the acquirer."

Mayne has pointed out in the foot-note that the above text makes it reasonably clear that what is meant is that any coparcener who uses the family stock through trade, agriculture or any other means for the purpose of augmenting it, is not entitled to an extra share for his special exertions and that it does not appear to have anything to do with blending the income of a distinct self-acquisition with the income of the joint family property and so converting that which was originally a self-acquisition into coparcenary property. In *Mallesappa* v. *Mallappa*[3], Gajendragadkar, J., has also criticised the above observation of Sir Dinsha Mulla in the above case and pointed out that the said text cannot be treated as the basis for the doctrine of blending as it has been judicially evolved. The doctrine of throwing into the common stock is also one evolved by judicial decisions.

In Mulla's principles of Hindu Law, 13th edition, page 253, section 227, the principles are clearly stated in the following terms:

> "Property which was originally the separate or self-acquired property of a member of a joint family may (by the operation of the doctrine of blending) become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself nor from the fact that the income of the separate property was used to support a son nor from the mere failure of a member to keep separate accounts of his earnings. So also acts of generosity or kindness should not be construed as admissions of legal obligation. Separate property thrown into the common stock is subject to all the incidents of joint family property."

Sri R. Gopalaswami Iyengar, appearing for the contesting respondents 1 and 2 urged that as there was no joint family property, there could be no question of Narayana Pillai throwing his self-acquired property into common stock. Such a

1. I.L.R. (1964) 1 Mad. 502.
2. (1932) 63 M.L.J. 196: L.R. 59 I.A. 331.
3. (1962) 2 M.L.J. (S.C.) 154: (1962) 2 S.C.J. 589 : (1961) 3 S.C.R. 779 : (1962) 2 An.W.R. (S.C.) 154: A.I.R. 1961 S.C. 1268 at 1271.

contention has been negatived in several decisions. Thus in *Damodar Krishnaji Nirgude* v. *Commissioner of Income-tax*[1], it was held that it was open to a member of a Hindu undivided family to throw his self acquired property into the family hotchpot even though there was no joint or ancestral property. Again in *Natesan* v. *Commissioner of Income-tax*[2], this contention has been negatived in the following passage:

"It is now well settled that a separate property of a coparcener under the Hindu Law can acquire the character of a joint family property of the coparcener by his own voluntary act of putting it in the common stock or blending it with joint family properties. The process of blending cannotes that there are two sets of properties, separate and joint family, and they are pooled so that the exclusive rights of the coparcener holding the separate property are abandoned; then there emerges only one kind of property, the whole of it becoming joint family property. Where, however, there exists no joint family property and the coparcener owning separate property desires to have it treated as joint family property, it will be open to him to do so and the Hindu Law does not require any formality to achieve this result. The act of the coparcener by which this conversion of separate property into joint family property takes place is described as throwing the property into the common stock or as treating the separate property as joint family property. It is, however, not necessary that there should be pre-existing common stock before it can be said that the separate property is thrown into it. In a case where the family has no joint family property, the *common stock* is a mere fiction and throwing into the common stock is only a convenient *phraseology* to describe the process of conversion. A clear, unequivocal and unambiguous declaration by the holder of the separate property that it is joint family property would sufficiently impress that property with the joint family character."

As pointed out in the above passage, the very concept of blending of self acquired property with ancestral or joint family property presupposes the existence of a joint family property. But it is clear from what we have already stated that the conversion of self-acquired property into a joint family property by what is known as throwing into common stock is only an application of the principle of abandonment or waiver of his rights by a coparcener with intention to treat his property as joint family property. Thus, in the Bench decision in *Subramania Iyer* v. *C.I.T., Madras*[3], Rajagopala Ayyangar, J. has observed as follows:

"Under the Hindu Law there is no necessity for joint family property to exist in order that there may be a joint family. The assessee and his son undoubtedly constitute members of a joint Hindu family. They might have started with no ancestral nucleus or other joint family property but there was nothing to prevent the assessee from impressing upon any self-acquired property belonging to him the character of joint family property. No formalities are necessary in order to bring this about and the only question is one of intention on the part of the owner of the separate property to abandon his separate rights and invest it with the character of joint family property. Where an inference of this sort is sought to be deduced from the conduct of the parties, there might be room for ambiguity and for difference of opinion. Where, however, it is the declaration of the owner of the separate property that is the evidence before the Court or the Tribunal, the inference that the character of joint family property is impressed upon the separate property follows, unless the words are incapable of that construction or if it represents merely a future intention not yet given effect to."

In *Ramaswami Nayakar* v. *Raju Padayachi*[4], it has been held that the question whether the self-acquired property of a member of a joint Hindu family has been thrown by him into the common stock or not is a question of fact. In *Pearey Lal* v.

1. (1962) 46 I.T.R. 1252.
2. I.L.R. (1964) 1 Mad. 502 at 505-506.
3. (1955) 2 M.L.J. 405 at 407.
4. (1926) 51 M.L.J. 167.

Nanak Chand[1], the Privy Council had to consider a case where a father, who had no ancestral property, started a business and his son claimed that by reason of his association in the business the character of the business became a joint family business. It has been held in that decision that the onus of proving that the separate business of the father became joint family business, especially when there is no ancestral property, is heavy on the son and that it is for the son to prove that he was associated in the business in such a manner as to raise a reasonable inference that the father intended to make and did make his business a joint family business. In *Subramania Iyer* v. *Commissioner of Income-tax, Madras*[2], it has been held that the declaration by the owner of the separate property in unambiguous terms in the partition deed entered into by him as the manager of the undivided family of himself and his minor son is sufficient to impress the character of joint family property upon the separate property.

The decision of this Court in *M. K. Stremann* v. *Income-tax Commissioner*[3], was confirmed by the Supreme Court in *Commissioner of Income-tax* v. *Stremann*[4]. The Supreme Court held that even from the time when instructions were given by the assessee for the preparation of the partition deed that his self-acquired property was to be treated as joint family property in the deed to be executed, the property assumed the character of the joint family property and that on execution the deed became evidence of a pre-existing fact, *i.e.* of throwing a self-acquired property into the hotch-pot. In *Kandaswami Chettiar* v. *Commissioner of Agricultural Income-tax*[5] a Bench of this Court observed that there has been a well known line of decisions which held that, where an assessee who is the manager of a joint Hindu family, proceeds to impress upon his self-acquired property with the character of joint family property and proceeds to divide it between himself and the other members of his family, it cannot be considered to be a case where he has effected an indirect transfer of his self-acquired property in favour of wife or minor children so as to attract the provisions of section 16 (3) of the Indian Income-tax Act, 1922. It was held, in the circumstances of that case, that the assessee Kandaswami, as the Manager of a joint Hindu family, desired to impress upon the schedule properties mentioned in the partition deed executed by him, which no doubt were his self-acquisitions, with a joint family character and thereafter to divide them between himself and the other members of the family. If an act or transaction by which a coparcener impresses his self acquired property with the character of joint family property cannot amount to transfer even under the wider definition in section 2 (47) of the Income-tax Act, it cannot obviously be a transfer within the meaning of the narrower definition of transfer in section 5 of the Transfer of Property Act.

A scrutiny of the terms of Exhibit A-1 in the present case does not disclose any intention on the part of Narayana Pillai to impress his self-acquired properties with the character of joint family properties. It is not the case of the appellant or the sixth respondent that Narayana Pillai treated the properties dealt with under Exhibit A-1 as joint family properties at any time prior to the execution of the document. It is true he could express his intention to treat the properties dealt with under Exhibit A-1 as joint family properties even under the very document and proceed to effect a partition of the properties among the members of his family. This is clear from the decision in *Damodar Krishnaji Nirgude* v. *Commissioner of Income-tax*[6], where it was held that the fact that throwing of self-acquired property into the family hotch-pot and partition of such property between the assessee and his wife and minor son were effected by the same deed did not materially affect the effect or validity of the partition. But there is no declaration by Narayana Pillai in the partition deed, Exhibit A-1, to treat his self-acquired properties as joint family properties by throwing them into a common stock, that is, by impressing them with joint

1. (1948) 61 L.W. 437.
2. (1955) 2 M.L.J. 405.
3. A.I.R. 1962 Mad. 26.
4. (1965) 1 L.T.J. 5 : (1965) 1 S.C.J. 106 : (1965) 2 S.C.R. 106.
5. (1967) 2 M.L.J. 352 : (1967) 2 L.T.J. 585 : (1967) 80 L.W. 511.
6. (1962) 46 I.T.R. 1252.

family character. The following passage in *Natesan* v. *Commissioner of Income-tax*[1], is relevant for the present discussion:

"There can be no doubt that a separate property will retain its character as such unless and until there is some evidence to show, either by the course of conduct of the exclusive owner of that property or by an express declaration of such a person, that it was treated as joint family property. The mere fact that a separate property is divided between the members of the family would not be sufficient to establish that at the point of division it was treated as joint family property. Nothing prevents a coparcener from being generous to the other coparceners and allowing them to share his exclusive properties. This is possible even without a change in the nature of the property. There may be a case in which his separate property and the admitted joint family properties are all brought into hotch-pot and divided and in such a case, the contention that the separate property also partook of the nature of joint family property is plausible; but where what is divided is only the separate property and there is no indication that at any point of time prior to its division or even at the moment of division, there was an alteration or change in the nature of the property, it would be very difficult to contend that the division amounts to a partition as the term is understood under the Hindu Law."

The mere fact that the document Exhibit A-1 is styled as a deed of partition, though a relevant circumstance, is not decisive on the question whether it is really a deed of partition. We have pointed out that Narayana Pillai has dealt with the properties under Exhibit A-1 as his self-acequired properties and has given shares even to his married daughters. It is true the sons and grandsons were parties to the document and consented to the shares being given to the daughters of Narayana Pillai. But, as already pointed out, Narayana Pillai merely complied with the request of his children and grandchildren and relations to effect a division as decided by him. One has to search in vain in Exhibit A-1 for a declaration, much less an unequivocal declaration, on the part of Narayana Pillai disclosing any intention on his part to treat his self-acquired properties as joint family properties. For the foregoing reasons, we are unable to accept the contention of the learned Advocate for the appellant and the sixth respondent that Exhibit A-1 is a deed of partition in respect of the joint family properties of Narayana Pillai and his sons and grandsons.

The learned Advocates for the appellant and the sixth respondent urged that Exhibit A-1 evidences a family arrangement. But no such plea had been put forward in the lower Court, or in the grounds of appeal. Sri Vedantachari relied on the decision in *Pullaiah v. Narasimham*[2] in support of his contention that although conflict of legal claims *in praesenti* or in future is generally a condition for the validity of family arrangements, it is not necessarily so and that even *bona fide* disputes present or possible, which may not involve legal claims, would be sufficient. It has been pointed out in that decision that members of a joint Hindu family may, to maintain peace or to bring about harmony in the family enter into such a family arrangement and if such an arrangement is entered into *bona fide* and the terms thereto are fair in the circumstances of a particular case, the Courts will more readily give assent to such an arrangement than to avoid it. Reliance was placed in that decision on the following observations of Bose, J., in *Sahu Madho Das* v. *Mukand Ram*[3], as showing how strongly the Court leans in favour of a family arrangement that bring about harmony in the family ;

"It is well settled that a compromise or family arrangement is based on the assumption that there is an antecedent title of some sort in the parties and the agreement acknowledges and defines what that title is, each party relinquishing all claims to property other than that falling to his share and recognising the right of the others, as they had previously asserted it, to the portions allotted to

1. I.L.R. (1964) 1 Mad. 502 at 506.
2. (1967) 1 S.C.J. 848 : (1967) 2 An.W.R. (S.C.) 14 : (1967) 2 M.L.J. (S.C.) 14 : A.I.R. 1966 S.C. 1836.
3. (1955) 2 M.L.J. (S.C.) 1 : (1955) S.C.J. 417. at 428.

them respectively. That explains why no conveyance is required in these cases to pass the title from the one in whom it resides to the person receiving it under the family arrangement. It is assumed that the title claimed by the person receiving the property under the arrangement had always resided in him or her so far as the property falling to his or her share is concerned and therefore no conveyance is necessary. But in our opinion, the principle can be carried further and so strongly do the Courts lean in favour of family arrangements that bring about harmony in a family and do justice to its various members and avoid, in anticipation, future disputes which might ruin them all, that we have no hesitation in taking the next step (fraud apart) and upholding an arrangement under which one set of members abandons all claim to all title and interest in all the properties in dispute and acknowledges that the sale and absolute title to all the properties resides in only one of their number (provided he or she had claimed the whole and made such assertion of title) and are content to take such properties as are assigned to their shares as gifts pure and simple from him or her, or as a conveyance for consideration when consideration is present."

In view of our finding that Narayana Pillai dealt with his self-acquired properties under Exhibit A-1, the other parties to the document had no antecedent title. It could not be pretended that there was any *bona fide* dispute between Narayana Pillai and his children and grandchildren when he divided and gave his properties to them under Exhibit A-1. In *Ram Charan Das* v. *Girija Nandini Devi*[1], relied on by Sri Vedantachari, it is pointed out that it is not necessary, as would appear from the decision in *Rangasami Gounden* v *Nachiappa Gounden*[2], that every party taking benefit under a family settlement must necessarily be shown to have, under the law, a claim to a share in the property and that all that is necessary is that the parties must be related to one another in some way and have a possible claim to the property or a claim or even a semblance of a claim on some other ground, as, say, affection. It is no doubt true that the children and grandchildren of Narayana Pillai had a claim to the affection of Narayana Pillai. But it could not on that ground be said that they had a claim or semblance of a claim against his self-acquired property. If the contention of Sri Vedantachari that even a semblance of a claim on some grounds such as affection is sufficient to support Exhibit A-1 as a family arrangement is accepted, it would lead to the result that every deed of gift by a father to his children or near relations could be treated as a family arrangement, though the other requisites of the family arrangement are absent. It is not possible to build an argument that Exhibit A-1 evidences a family arrangement solely on the stray observation in the above Supreme Court decision made in the course of a discussion whether a transaction which was a family settlement amounted to a transfer or creation of trust in the property. It is clear from the Supreme Court decision that the transaction in question in that case is a family arrangement entered into by the parties *bona fide* for the purpose of putting an end to the dispute among the family members. In the present case, neither the appellant nor the sixth respondent has stated that there were any disputes, or that any dispute was in contemplation which necessitated any family arrangement. In *Jatru Pahan* v. *Ambikajit Prasad*[3], it has been held that the existence of a family dispute is not essential to the validity of a family arrangement, nor is the existence of a doubtful claim based on the allegation of an antecedent title essential for the validity of a family arrangement; such arrangement may bind the parties to it if it is for the benefit of the family, or for the maintenance of peace and harmony and the avoidance of future discord or for the preservation of the property, but there must be some kind of consideration before an agreement in respect to the division of family property can be held to be a valid family arrangement, though in such cases the Court will not scrutinize the quantum of consideration with meticulous nicety. Again in

1. (1965) 3 S.C.R. 841 : (1966) 1 S.C.J. 61 at 72 : 36 M.L.J. 493.
67.
2. (1919) I.L.R. 42 Mad. 523 : L.R. 46 I.A.
3. A.I.R. 1957 Pat. 570.

Gangabai v. *Punau Rajwa*[1], it was held that where a family arrangement was merely a cloak for the transfer it could not be upheld. In *Natesan* v. *Commissioner of Income-tax*[2], it is pointed out that a separate property of a coparcener cannot be fragmented into shares and disposed of by allotment to sharers under the guise of partition without the element of transfer of property. Even if the document Exhibit A-1 is styled as a family arrangement, it is really a gift by Narayana Pillai to the several members of his family. It is true the parties to the document get rights under it. But it is not by virtue of any antecedent title or *bona fide* claim. For the foregoing reasons, we see no reason to differ from the finding of the learned Second Additional Subordinate Judge that, though Exhibit A-1 purports to be a partition deed, it is really a gift deed by Narayana Pillai in favour of the members of his family.

The learned Second Additional Subordinate Judge held that the restrictions in respect of the power of disposal and enjoyment placed on the sharers would be clearly hit by sections 10 to 12 of the Transfer of Property Act. The learned Advocates for the appellant and the sixth respondent urged that Exhibit A-1 is either a deed of partition, or a deed of family arrangement, and is, therefore, not a transfer within the meaning of section 5 of the Transfer of Property Act and hence sections 10 to 12 of the Transfer of Property Act could not be invoked. They further contended that even if Exhibit A-1 is treated as a gift deed, the restrictions as to alienation and enjoyment are not absolute, but limited, and are, therefore valid.

The principles of sections 10 and 11 of the Transfer of property Act are based on English common law. It is clear from page 96 of Mulla's Transfer of Property Act, Fifth Edition, that section 10 incorporates a rule of justice, equity and good conscience, and governs transfers to which the Act does not apply. At page 102 of the same book it is stated that the prohibition or a condition in absolute restraint on alienation enacted in section 10 conforms to Hindu and Mohomedan Law. Again at page 105 of the book it is stated that the invalidity of conditions in restraint of enjoyment of property is recognised both in Hindu and Mohomedan Law and that a direction in restraint of partition in a Hindu will or in a Hindu gift is void. It is stated in the same page that a right to partition is an incident of joint ownership of property and a reference is made to the views of the several High Courts in the following terms:—

> " In *Umrao Singh* v. *Baldeo Singh*[3], a testator left his property to his sons jointly with a direction that the property should not be partitioned till all the sons attain majority. The Lahore High Court held that this was an invalid restriction on the right of enjoyment even though it was for a limited time. An agreement not to partition, though it may be binding on the immediate parties, will not bind their successors in interest, *Anand Chandra* v. *Pran Kisto*[4]. The Bombay High Court has held that such an agreement is inconsistent with the Hindu Law and will not bind even the parties themselves, *Ramalinga* v. *Virupakshi*[5] and the Allahabad High Court has held that even an immediate party is not bound by an agreement not to partition for an indefinite time, *Chandar Shekhar* v. *Kundan Lal*.[6]

The argument of Sri Vedantachari is that it is well settled that a partition under the Hindu Law of joint family assets does not operate as transfer *inter vivos*, as it is only the ascertainment of shares of coparceners, who at the time of the partition, are admittedly the persons having an interest in the properties and hence the prohibitions and restrictions imposed in sections 10 to 12 of the Transfer of Property Act could not be invoked. But, in our opinion it is not possible to contend that the parties could transgress the rule of perpetuity embodied in section 14 of the Transfer of Property Act in effecting a partition. In *Pirojasha* v. *Manibhai*[7], a Division Bench held that the mere fact that the parties settled among themselves by compro-

1. A.I.R. 1956 Nag. 261.
2. I.L.R. (1964) 1 Mad. 502.
3. (1933) I.L.R. 14 Lah. 353.
4. (1866) 3 Beng. L.R. 14 (O.C.).
5. (1833) I.L.R. 7 Bom. 538.
6. (1909) I.L.R. 31 All. 3.
7. (1912) I.L.R. 36 Bom. 53.

mise that the lands should not be divided, but they should enjoy the profits, could not in law impart the character of impartibility to the estate and that parties cannot make an estate impartible which is partible, as it is opposed to public policy. In *Mudara* v. *Muthu Hengsu*[1], it has been held that, however much people may desire to keep their property in the hands of their descendants, they cannot succeed in doing so by violating the provisions of law as to transfer of property. The condition restraining alienation was embodied in a partition deed and the effect of the condition was to make the shares of the defendants branch for ever inalienable except with the consent of the members of the other branch who had no interest in it at all. In fact, the alienation by way of a mortgage was not even executed by all the members of the defendants' branch nor *a fortiori* by those members together with the members of the other collateral branch. It is observed in the decision that the Courts below seem to have been influenced by the fact that such conditions are frequently contained in family arrangements on the West Coast in Marumakathayam and Aliyasanthanam families into thinking that wherever they occur they must be according to the spirit of the people and therefore, not invalid. In *T. V. Sangam Ltd.* v. *Shanmugha Sundaram*[2] a Special Bench of this Court held that a restriction on alienation in a partition deed among the father and the sons that the sons should not sell their shares in the family residence to a stranger, but only to a member of the family far below the real value of the share of each son, without a corresponding obligation on the others to buy at that price, was an absolute restraint. Thus the principle of section 10 of the Transfer of Property Act has been invoked in construing the restraint on alienations even in deeds of partition.

In *Arumugha Chetty* v. *Ranganathan Chetty*[3], it has been held that co-parceners in a joint Hindu family can agree for consideration that for a certain time or until a certain event or for their lives, they will not exercise their right to divide. It is stated at page 410 of the decision that there could be no legal obstacle to such an agreement. There is a clear distinction recognized in law of real property between personal covenants and covenants running with the land. How far the equitable rule that the burden of a covenant runs with the land is to be found in section 40 of the Transfer of Property Act. Restrictions as regards alienation and enjoyment in personal covenants can bind the parties or transferees with notice of the personal covenants. The decisions relied on by the learned Advocates for the appellant and the sixth respondent could be clearly distinguished on this principle.

In *Mohammed Raza* v. *Mt. Abbas Bandi*[4], it has been held that where a person has been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement can hardly support their claim by an appeal to the high sounding principles, such as justice, equity and good conscience. It was held in that decision that the terms of the compromise were binding, that the restriction as to alienation was only partial and such a partial restriction was neither repugnant to law or to justice, equity and good conscience. In fact, there is the following observation at page 160 of the decision :

> " It is in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take......In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she (plaintiff) should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them".

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1. A.I.R. 1935 Mad. 33.
2. I.L.R. (1939) Mad. 954 : (1939) 2 M.L.J. 345 ; A.I.R. 1939 Mad. 769.
3. (1934) I.L.R. 57 Mad. 405 : 65 M.L.J. 741.
4. (1932) 63 M.L.J. 180 : L.R. 59 I.A. 236 : A.I.R. 1932 P.C. 158.

In *Rup Singh* v. *Bhabhuti Singh*[1], it has been held that the members of a joint undivided Hindu family can bind themselves for their own lifetime not to claim partition of the joint family property and that what may be effected by an agreement may be effected equally by means of a submission to arbitration followed by an award. The decision in *Aulai Ali* v. *Syed Ali Athar*[2], is only to the effect that a contract of pre-emption does not offend against rule against perpetuities. In *Ratanlal* v. *Ramanujdas*[3], it has been held that an agreement between two brothers that if one of them wished to sell his share in the residential house, it should be sold to the other for a fixed price is not invalid either under section 10 or section 14 of the Transfer of Property Act because such an agreement creates no interest in the property and that it binds only the parties and the representatives of the promisor. In *Parvathi Pillai* v. *Neelan Nadar*[4], it has been held that a family settlement does not come within the purview of the Transfer of Property Act. There can be no doubt about the actual decision in that case. Under a partition deed between *A*, *B* and *C*, *A* got his one-third share and he settled it upon *B* reserving a life interest for himself. It has been held in that case that the restriction on alienation imposed on *A* is binding on him as *A* reserved only a life interest in himself and agreed not to effect any alienation and that it was not competent for him to sell the property.

We have already found that Exhibit A-1 is really a deed of gift by Narayana Pillai in favour of his children and grand children. Hence the real question to be considered in this appeal is whether the restrictions as to alienation and enjoyment can be supported on the ground that they are not absolute, but partial. It is, therefore, necessary to consider the relevant terms of Exhibit A-1 restricting alienation and enjoyment of the suit properties by the plaintiff and defendants 3 to 6. Under Exhibit A-1, Narayana Pillai has reserved a life interest in the suit properties and given absolute vested interest in favour of the plaintiff and defendants 3 to 6 in the said properties and specified their shares. The subsequent clause in Exhibit A-1 is as follows :

> "All persons mentioned above who obtain the *A* Schedule properties shall, effect any sale etc., only jointly but should they alienate their proportionate share or let out for rent etc., to third persons in their individual capacity they shall not be valid for any reason whatsoever."

It is clear from the above terms in Exhibit A-1 that after giving absolute vested interest in the suit properties to the plaintiff and defendants 3 to 6 in the suit, Narayana Pillai has imposed an absolute restraint prohibiting them from alienating their shares by way of sale etc. The words 'all persons' in the above clause refers to not only the plaintiff and defendants 3 to 6, but also to their sons, grandsons etc., who are to succeed to their properties. Even if it is construed as restricting alienations by the plaintiff and defendants 3 to 6 alone, it is an absolute restraint, which is invalid. In *Rosher* v. *Rosher*[5], it has been held that a condition in absolute restraint of alienation annexed to a devise in fee, even though its operation is limited to a particular time, *e.g.*, to the life of another living person, is void in law as being repugnant to the nature of an estate in fee. The testator in that case devised an estate to his son in fee, provided always that if the son, his heirs or devisees, or any person claiming through or under him or them, should desire to sell the estate, or any part or parts thereof, in the lifetime of the testator's wife, she should have the option to purchase the same at the price of £3,000 for the whole and at a proportionate price for any part or parts thereof, and the same should accordingly be first offered to her at such price or proportionate price or prices. The real selling value of the estate was at the date of the will and at the time of the testator's death, £15,000. It was held in that case, that the proviso amounted to an absolute restraint on alienation during the life of the testators' widow ; that it was void in law ; and that the son was entitled to sell the estate as he pleased, without first offering it to the widow at the price named in the will. In *Gomti Singh* v. *Anari Kuar*[6], it has been held that the condi-

1. (1920) I.L.R. 42 All. 30.
2. A.I.R. 1927 All. 170.
3. A.I.R. 1944 Nag. 187.
4. A.I.R. 1955 Tra-Co. 231.
5. (1884) 26 Ch. D. 801.
6. A.I.R. 1929 All. 492.

tion in a deed executed by a Hindu governed by the Mitakshara School of Hindu Law making his two wives joint owners along with him of certain property and providing that neither he nor his wives would have the right to transfer the property separately unless all combined to make such transfer, was held to be an absolute restraint within the meaning of section 10 of the Transfer of Property Act. The decision refers to a similar case in *Khiali Ram* v. *Raghunath Prasad*[1], in which Knox, J., held that a term of the compromise embodied in a decree that the party to whom the house was conveyed under it was not at liberty to transfer it without the consent of the other party to that compromise was void as being a restraint upon alienation and that the house could be transferred in spite of that condition. Thus the restraint imposed on the plaintiff and defendants 3 to 6 that if they want to effect a sale etc. they could do so only jointly, but not individually, in respect of their respective shares, is clearly an absolute restraint, which is void under section 10 of the Transfer of Property Act.

In the latter part of the document Exhibit A-1 Narayana Pillai has prescribed the mode and enjoyment of the suit properties. His sons Paramasivam and Arunachalam appear to have been residing with him at the time of Exhibit A-1. It is clear from the document that Narayana Pillai had executed a power of attorney in favour of Paramasivam to conduct the suit filed by him against defendants 1 and 2 in respect of the suit properties. Under the terms of Exhibit A-1, Paramasivam was directed to conduct the cinema theatre for a period of five years after obtaining possession of the suit properties from defendants 1 and 2 and pay Narayana Pillai an aggregate rent of Rs. 750 per month. The document Exhibit A-1 provides for the enjoyment of the suit properties for a subsequent period of three years by the sixth defendant Venugopal and likewise, by defendants 4 and 5 for the next three years and by the third defendant Arunachalam for the succeeding three years, subject to payment of rent to Narayana Pillai. After the turn to the third defendant Arunachalam, the plaintiff Paramasivam is entitled to enjoy the suit properties for a period of three years and thereafter each of the other parties are entitled to enjoy the suit properties by turn for a period of theree years as provided earlier, but there is no reference to payment of rent to Narayana Pillai. Thus Exhibit A-1 provides for a permanent arrangement for the enjoyment of the suit properties by turns. The contention of the contesting defendants 1 and 2 is that the provision as regards the mode of enjoyment of the suit properties in Exhibit A-1 was intended to be operative only during the lifetime of Narayana Pillai. If the said construction is correct, it will not offend section 11 of the Transfer of Property Act, as Narayana Pillai had a life interest in the suit properties and he is clearly entitled to provide for the enjoyment of the suit properties by the plaintiff and defendants 3 to 6 by turns, subject to their paying rent to him. It is true Narayana Pillai has executed a power of attorney to the plaintiff Paramasivam to conduct the litigation against defendants 1 and 2 and to recover possession of the suit properties. He has made provision for the period during which each of the plaintiff and defendants 3 to 6 should enjoy the suit properties and pay him rent. But it should be noted that after referring to the enjoyment of the suit properties in turns by the plaintiff and defendants 3 to 6 subject to payment of rent to him, he has proceeded to state that the plaintiff should get his next turn, but that it should be only for a period of three years, instead of five years as stated in the earlier clause. It is clear from the document that the parties should thereafter enjoy the suit properties by turns of three years each. It is admitted that Narayana Pillai was 90 years old at the time of Exhibit A-1 and he died shortly after effecting the alleged partition evidenced by Exhibit A-1. The detailed provision for enjoyment of the suit properties for several terms could not be merely for the period of Narayana Pillai's lifetime. There can be no doubt that Narayana Pillai has made a permanent provision for the enjoyment of the suit properties by turns for indefinite period. We have already found that Exhibit A-1 is a deed of gift by Narayana Pillai. By virtue of section 11 of the Transfer of Property Act, such a

1. (1906) 3 A.L.J. 621 : (1906) A.W.N. 214.

restraint upon enjoyment of the suit properties is repugnant to the absolute interest given to the plaintiff and defendants 3 to 6 and it is void. The fact that the plaintiff and defendants 3 to 6 have joined in executing the document Exhibit A-1, cannot estop them from disputing the validity of the clause in Exhibit A-1 restricting the enjoyment of their shares.

The parties to the suit have really dealt with the suit properties as though the conditions restraining alienation and enjoyment are invalid. We have already referred to the sale deeds Exhibits B-1 and B-2 executed by defendants 3 to 5 in respect of their half share and the lease Exhibit B-5 executed by the sixth defendant. In fact, defendants 3 to 6 have filed written statements stating that they do not admit the allegations made in the plaint. It is submitted that during the pendency of this appeal, the appellant-plaintiff has sold his share of the suit properties. Even in the lease deed Exhibit A-1 executed by the plaintiff and defendants 3 to 6 in favour of defendants 1 and 2, provision is made for payment of rent separately to each of the sharers.

The learned Second Additional Subordinate Judge has commented on the fact that the plaintiff has failed to get the sale deed Exhibits B-1, B-2 and the lease deed B-5 set aside. The plaintiff is not a party to these documents and he cannot sue to have them set aside. He can only seek a declaration that the alienations are invalid in view of the conditions in Exhibit B-1 restricting such alienations and that they will not bind him. But in view of our findings that the conditions in Exhibit A-1 restricting alienation of the suit properties by plaintiff and defendants 3 to 6 are invalid and inoperative, the plaintiff can get no such declaration.

The learned Second Additional Subordinate Judge has erred in dismissing the suit completely. Admittedly, the plaintiff is entitled to 1/4th share in the suit properties. It is true defendants 1 and 2 got a lease of the suit properties from the plaintiff and defendants 3 to 6 under Exhibit A-2, but the term of the lease has expired. Defendants 1 and 2 have purchased the shares of defendants 2 to 5 in the suit. Under section 44 of the Transfer of Property Act.

> "Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein the transferee acquires, as to such share or interest, and so far as is necessary to give effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting, at the date of the transfer, the share or interest so transferred."

But defendants 1 and 2 have already obtained possession of the suit properties as lessees from all the sharers who are entitled to the suit properties. Plaintiff is a co-owner of the suit properties as he is entitled to one-fourth share in the same. It is true he cannot get exclusive possession of the suit properties, but he is entitled to decree for joint possession of the suit properties along with the other co-owners.

The decree and judgment of the learned Second Additional Subordinate Judge totally dismissing the suit with costs are wrong and they are set aside. There shall be a decree in favour of the plaintiff for joint possession of the suit properties with defendants 1 and 2. It is open to the plaintiff to take appropriate steps to work out his rights to get his share of the income of the suit properties or to effect a partition. The possession of the suit properties with defendants 1 and 2 as co-owners cannot be said to be wrongful and the claim for damages made by the plaintiff was rightly dismissed. Having regard to the above facts, we direct the plaintiff to pay half the costs of the suit to defendants 1 and 2 in the trial Court. Defendants 1 and 2 are entitled to half the costs of this appeal from the plaintiff and the sixth defendant.

V.M.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice* AND MR. JUSTICE S. MAHARAJAN.

Mayilsami Gounder .. *Petitioner**

v.

Rammoorthi Chettiar and another .. *Respondents.*

Madras Cultivating Tenants Protection Act (XXV of 1955), *sections* 3 (4) *and* 4 (5)—*Tenant evicted in pursuance of order under section* 3 (4)—*Reversal of that order in Revenue Court has no inherent power to order restitution—Statutory bodies—Powers of.*

Unlike Courts of law which would have inherent powers, although there is no specific enabling statutory provision, the position of statutory bodies entrusted with specified powers is entirely different. The powers of such a statutory body are entirely limited and controlled by the statute which confers them, and, it cannot act outside the limits of the statute creating it. On that view, it could have no inherent power. It is another matter if on a construction of a statutory provisions an inference therefrom can be made of an ancillary or necessary power to execute the main purpose covered by the statute. But that principle will be inapplicable to construction of section 4 (5) of the Act.

The scope of the power under section 4 (5) of the Act does not extend to a case of eviction of the tenant under sub-section (4) of section 3. This is an express limitation upon the scope of the power conferred by section 4 (5). The Court cannot impute an intention on the part of the Legislature so as to enable to infer an inherent power to put the teant in possession who has been evicted in execution of an order under section 3 (4) of the Act.

It may be unfortunate that notwithstanding the reversal of the eviction order the tenant is unable to get restoration. But, it is for the Legislature to provide for the situation.

View expressed in *Raso Moopanar* v. *Ramamurthy Iyer*, I.L.R. (1968) 2 Mad. 571: (1967) 1 M.L.J. 287, to the contrary, overruled.

Petition under section 6-B of Madras Act XXV of 1956 read with section 115, Civil Procedure Code, praying the High Court to revise the order of the Assistant Collector, Pollachi dated 10th January, 1966 and made in M.C.T.P. No. 5 of 1964.

S. Mohan, for Petitioner.

S. Palaniswamy and *R. Ramamoorthi,* for Respondents.

The Judgement of the Court was delivered by

Veeraswami, C.J.—This revision petition comes befor us on a reference made by one of us. The petitioner is the tenant who applied for restoration of possession on an eviction order being reversed, in execution of which, he had been deprived of possession, but, the Revenue Divisional Officer dismissed the application on the ground of limitation.

The respondent applied for eviction in February, 1960 which was ordered. Since the tenant failed to deposit the rent within the time allowed, the order was put to execution and the landlord entered upon possession in July, 1960. Eventually the revision petition directed against the order of eviction was allowed by this Court on the ground that the respondent should have impleaded the newly inducted tenant. On the strength of this order of reversion, the tenant, who is the petitioner before us, applied for restitution. But the application was dismissed on the ground that it was out of time under the provisions of section 4 (5) of the Madras Cultivating Tenants Protection Act, 1955. The petition under consideration is to revise that order.

When the petition came before one of us, it was felt that there was no jurisdiction vested in the Revenue Divisional Officer to order restoration, and that since

* C.R.P. No. 439 of 1967. 9th October, 1969.

section 4 (5) would have no application to a case of deprivation of possession of a tenant, in execution of an order under section 3 (4), no question of limitation could for that reason arise. But *Raso Moopanar* v. *Ramamurthy Iyer*[1], had taken the view that because, as would be obvious from the Act, the Legislature was so particular about protecting the rights of cultivating tenants, it would be reasonable to infer that it did not intend that a cultivating tenant who had been evicted from his holding in pursuance of an order of Court which is subsequently found to be wrong, should be left helpless and without any remedy to get possession of the holding from which he had been so evicted. In the view of one of us this view required reconsideration and that is how it has been placed before a Division Bench.

Unlike Courts of law which would have inherent powers, although there is no specific enabling statutory provision, the position of statutory bodies entrusted with specified powers is entirely different. The powers of such a statutory body are entirely limited and controlled by the statute which confers them, and, it cannot act outside the limits of the statute creating it. On that view, it could have no inherent power. It is another matter if on a construction of a statutory provision an inference therefrom can be made of an ancillary or necessary power to execute the main purpose covered by the statute. But, in our view, that principle will be inapplicable to the construction of section 4 (5) of the Act. That provision reads :

> "Any cultivating tenant who after the commencement of this Act has been evicted except under the provisions of sub-section (4) of section 3 shall be entitled to apply to the Revenue Divisional Officer within two months from the date of such eviction or within two months from the date of coming into force of the Madras Cultivating Tenants Protection (Amendment) Act, 1956, for the restoration to him of the possession of the lands form which he was evicted and to hold them with all the rights and subject to all the liabilities of a cultivating tenant. The provisions of sub-section (4) shall, so far as may be, apply to such an application."

It is amply clear that the scope of the power under this provision does not extend to a case of eviction of the tenant under sub-section (4) of csection 3. This is an express limitation upon the scope of the power conferred by section 4 (5). We do not think how we can, notwithstanding the express exclusion, impute an intention on the part of the Legislature so as to enable us to infer an inherent power to put the tenant in possession who has been evicted in execution of an order under section 3 (4) of the Act. With respect, therefore, we are not able to share the view in *Raso Moopanar* v. *Ramamurthy Iyer*[1].

It may be unfortunate that notwithstanding the reversal of the eviction order the tenant is unable to get restoration . But, it is for the Legislature to provide for the situation.

The petition is dismissed. No costs.

It is represented to us that the tenant has deposited certain sums of money before the Revenue Divisional Officer pending this proceeding. The petitioner would be at liberty to apply to him for payment of the sums.

S.V.J. *Petition dismissed.*

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1. I.L.R. (1968) 2 Mad. 571 : (1967) 1 M.L.J. 287.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE M. NATESAN AND MR. JUSTICE B.S. SOMASUNDARAM.

State of Madras represented by the Special Tahsildar, Regional Engineering College, Scheme, Tiruchirapalli .. *Petitioner**

v.

Muthurethinam and others .. *Respondents.*

Limitation Act (*IX of* 1908), *sections* 5 *and* 12 (2) *and* (3) *and Civil Procedure Code* (*V of* 1908), *Order* 41, *rule* 1—*Common Judgment in suits or appeals—Party obtaining only one set of copies of judgments—Whether entitled to deduction of time under section* 12 *of the Limitation Act in respect of all the appeals—Necessity for petition under section* 5 *of the Limitation Act.*

The order of reference was " whether in a common judgment disposing of a batch of suits or appeals, a party will be entitled to the deduction of time under section 12 of the Limitation Act in respect of all the appeals, though he had obtained only one set of copies of judgment.

Held, section 12 (2) and (3) of Limitation Act are not in any way qualified or limited in their application by anything outside those provisions. The direction by those provisions is that in computing time for purposes of exclusion the day on which the judgment appealed against was pronounced and the time required for obtaining a copy of the decree as well as of the judgment should be taken into account for exclusion. The provisions are silent as to who should apply for such copies or whether they should at all be filed along with the appeals. But Order 41, rule 1 of the Civil Procedure Code requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and also a copy of the judgment. This requisite, except as to the decree, is not an inflexible rule, as the Court has the power to dispense with the production of copies of judgment. This provision of the Code is obviously unrelated to section 12 of the Limitation Act and cannot be understood as enjoining that exclusion for computation of time for limitation for an appeal should only be based on the endorsements in the certified copies of the judgment necessarily to be filed therewith. Order 41, rule 1 of the Code is limited to the procedure in filing an appeal and is concerned with the form of the memorandum of appeal and the enclosures thereto. That rule has nothing to do with the exclusion of time which is entirely dependent on section 12 of the Limitation Act. The result of this view of the scope of section 12 of the Limitation Act and Order 41, rule 1, is that there is no inter-dependence or connection between them so that whether or not an appellant is entitled to exclusion of time will not depend upon any requisition for filing copies of judgment and decree in an appeal, though of course exclusion has to be determined in the light of the endorsements on the certified copies of the judgment, of the decree or both, as the case may be, as to the time taken in supplying them.

Where, therefore, several appeals arise from a common judgment and they have been filed by the same party, there is nothing to prevent him from relying on a copy of the judgment of decree, or both, filed in only one of them, for exclusion of time in computing limitation for each of such appeals. For that purpose the party concerned is not required by section 12 (2) to file copies of the judgment and decree along with the memoranda of any of the appeals. That requisite flows not from the provisions of the Limitation Act but from the procedure prescribed under Order 41, rule 1 of the Civil Procedure Code. The idea in allowing exclusion of time for computation of limitation is to allow the party concerned time to

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* C.M.P. Nos. 13533, 13534, 13535, 13539, 13540, 13542 and 13543 of 1967 in Appeal S. R. Nos. 30109, 30097, 30105, 30125, 30113, 30089 and 30085 of 1966 respectively. 17th November, 1969.

consider whether he is called upon to file an appeal. If that is borne in mind, one cannot see why a copy of the judgment and decree filed in one of the appeal cannot be made use of for purposes of getting exclusion of time in the other connected appeals filed along with it simultaneously by the same party. If in such appeals it is shown with reference to the endorsements on the copies of the judgments and decrees that by the exclusion of time warranted by them the appeals are in time the requirement of the Limitation Act is satisfied. On that view no question of limitation will, therefore, arise in the appeals. Dispensation of production of copies of judgments is called for only because of Order 41, rule 1, Civil Procedure Code.

Held, the common appellant having filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of the appeals the benefit of exclusion on the basis of the endorsements, of the time taken in furnishing the certified copy of the judgment would not merely be available to the appeal in which the certified copy of the judgment was filed but would enure also to the other connected appeals filed by the same party against the common judgment. *Held*, appeals were all within time, and, the petitions for excusing the delay are unnecessary.

State of Madras v. *Mohammed Sirajudeen*, (1966) 2 M.L.J. 380 : I.L.R. (1967) 21 Mad. 64, overruled.

Petition praying that in the circumstances stated therein and in the affidavits filed therwith, the High Court will be pleased to excuse the delay in filing Appeals S.R. Nos. 30109, 30097, 30105, 30125, 30113, 30089 and 30085 of 1966, sought to be preferred to the High Court against the decrees of the Court of the Principal Subordinate Judge, Thiruchirapalli, dated 2nd December, 1965 and passed in O.P. Nos. 270 of 1964, 237 of 1964, 269 of 1964, 37 of 1965, 361 of 1964, 207 of 1964 and 201 of 1964 respectively.

These petitions first came on for hearing before a Division Bench (Venkataraman and Ramamurti, JJ.

The Additional Government Pleader and *K. S. Bakthavatsalam*, on behalf of Petitioner in all the petitions.

N. Sivamani and *V. Narayanaswami*, for Respondent in C.M.P. Nos. 13533 and 13535 of 1967.

P. S. Narasimhan for *P. S. Srisailam* and *S. Natarajan* for Respondent in C.M.P. No. 13534 of 1967 and for Respondent No. 2 in C.M.P. No 13540 of 1967.

N. K. Ramaswamy, for Respondent in C.M.P.No. 13543 of 1967.

The Order of the Court was made by

Ramamurti, J.—In a batch of Land Acquisition cases, a common judgment was delivered by the trial Court. The State of Madras obtained 12 printed copies of judgment and filed an appeal which (for the sake of convenience) may be referred to as the main appeal. In the other appeals, the memorandum of appeal was accompanied only by a copy of the relevant decree along with a petition to dispense with the production of printed copies of judgment on the ground that in the main appeal, 12 printed copies had been filed. Along with this, a petition has also been filed, in each of these appeals, to excuse the delay, if any, in filing the appeals as they would be barred by limitation if the time taken for obtaining certified copies of the relevant decrees alone is taken into account under section 12 of the Limitation Act, hereinafter referred to as the Act.

In all cases, where a common judgment is delivered disposing of a batch of cases, the practice of this Court has been to dispense with the production of the printed copies of the judgment in the rest of the appeals provided in one appeal the requisite number of printed copies of the common judgment are filed. Following this practice, we dispense with the production of the copies of the printed judgment in the present batch of appeals.

Mr. Sivamani learned Counsel for the respondent drew our attention to the decision of Byers, J., in *Jami Kurmanus, In re*[1], in which the learned Judge after comparing the language of Order 41, rule 1, Civil Procedure Code and Order 41-A, rule (2) sub-rule (i) Civil Procedure Code held that in the case of appeals to the High Court, it has no power to dispense with the production of the copies of the judgment. Our attention was also drawn to the decision of Chandrasekhara Iyer, J., in *Rayulla Ramappa, In re*[2], in which the learned Judge differing from Byers, J. held that the High Court has such a power. With respect we agree with the decision of Chandrasekara Iyer, J. A reading of all the provisions of Order 41-A, dealing with appeals to the High Court from the subordinate Courts shows that the provisions of Order 41 would undoubtedly apply to appeals in the High Court subject only to the modifications contained in Order 41-A. The provisions of Order 41-A, have to be necessarily read into and applied along with the provisions of Order 41 and the provisions of Order 41-A, would prevail only to the limited extent to which there is a special provision. In other words, the procedural law governing appeals to the High Court is the combined operation of Order 41 and Order 41-A, the latter order prevailing only to the limited extent of a different specific provision. The provisions of Order 41-A cannot be applied in isolation. So far as the requirement of production of the copy of judgment is concerned, in the case of an appeal to the High Court, a memorandum, should be accompanied by printed copies and they should be twelve in number. It is only to this extent that there is a variation and in other respects, the provision in order 41 would apply and this Court will have undoubted jurisdiction to dispense with the production of the copies of judgment in a proper case.

If a sub-Court or a District Court has jurisdiction and power to dispense with the production of a copy of the judgment in an appeal preferred to it, we do not find any reason why the High Court should be denied such a power, in the case of an appeal preferred to the High Court. The provision for dispensing with is specially provided in Order 41 rule 1, only because of the clear necessity felt for such a provision, as otherwise, serious hardship and injustice would arise. In innumerable cases, the appellant may not be in a position to file the copy of the judgment and unless such a power is reserved to Subordinate Courts, the right of appeal itself would become illusory and futile. It is obvious that the position must be the same with regard to appeals preferred to the High Court, and there is no basis to make any distinction between the two sets of appeals. That, this is the only correct view, also follows from the provisions of Order 42 governing procedure in the case of second appeals. Order 42 contains only one rule to the effect that the rules of Order 41, Order 41-A shall apply, so far as may be, to appeals to the High Court from appellate decrees. There cannot be any doubt that in the case of a second appeal, the High Court will have power to dispense with the production of judgment. The Madras amendment consist of three rules Order 42, rules 1, 2 and 3. Order 42, rule (1) states that Order 41 and 41-A shall apply to second appeals to the High Court. We are not prepared to accept any interpretation which will involve this anomaly, that the High Court will have power in the case of second appeals, to dispense with production of copies of judgment and no such power in the case of first appeals. We do not find anything either in the scheme or the language, of the provisions of Order 41-A to deny the High Court such a power

1. (1945) 1 M.L.J. 268. 2. (1945) 2 M.L.J. 563.

which is so vital and necessary. For all these reasons and following the uniform practice of this Court, the production of the copies of judgment is dispensed with in this batch of appeals.

The question next arises whether there is any delay in filing these appeals this point is linked up with the question whether the appellants are entitled to the exclusion of time taken for obtaining the printed copies of the judgment which have been filed in the main appeal. Our attention was drawn to the Bench decision of Veeraswami and Natesan, JJ., reported in *State of Madras* v. *Mohammed Sirajuddeen*[1], where the Bench following an earlier Bench decision of this Court reported in *Avudai Ammal* v. *Ganapathi*[2], held the appellant was not entitled to deduct the time taken in obtaining copies of judgments filed in another connected appeal arising out of the same common judgment. A similar view taken by Kailasam, J. in C.M.P.Nos. 296 to 310 of 1966 was also referred to with approval in the said Bench decision. The identical question again came up in an unreported case in C.M P. Nos. 2643 to 2646 of 1968, in a batch of Land Acquisition Appeals and the Bench (consisting of Srinivasan and Sadasivam, JJ.) followed the earlier Bench decision in *State of Madras* v. *Mohammed Sirajuddeen*[1]. At the same time the Bench rejected the argument of Counsel for the Government that applying the principle in the decision of the Supreme Court reported in *Additional Collector of Customs* v. *Best & Co* [3], the appellant would be entitled to the deduction of time and that the earlier Bench decision in *State of Madras* v. *Mohammed Sirajudeen*[1], would no longer apply. The same argument (besides other submissions as to the scope of the decision of the Supreme Court was addressed before us by the learned Government Pleader, on the proper interpretation of section 12 of the Limitation Act. After a careful analysis of the relevant case-law on the topic (with great respect to the learned judges of this Court who rendered the decisions aforesaid) we are inclined to take the view that the appellant is entitled to a deduction of the time as claimed and consequently there has been no delay in filing this batch of appeals. The attention of the learned Judges who rendered the decision in *State of Madras* v. *Mohammed Sirajudeen*[1], was not drawn to a very important decision of the Privy Council reported in *J. N. Surty* v. *T. S. Chettyar A firm*[4], referred to as Surty's case; further the learned Judges did not have the benefit of the elucidation of the law by the Supreme Court in the decision reported in *Additional Collector of Customs* v. *Best & Co.*[3], which competelly followed and referred to with approval the decision of the Privy Council in the Surty's case. In the later Bench decision of this Court the earlier Bench decision was simply followed, as it is binding upon them, and there is not much of a discussion. As the point raised, involves an important principle as to the proper interpretation of section 12 of the Limitation Act and the rule of procedure to be followed in numerous cases of frequent occurrence, we are of the view that it is necessary that there should be an authoritative pronouncement by a Full Bench. We, therefore, propose to give hereunder, our reasons, for the reference to a Full Bench.

Section 12 (2) of the Act amongst other things, provides that in computing the period of limitation prescribed for an appeal, the time requisite for obtaining a copy of the decree, shall be excluded and section 12 (3) provides that the time requisite for obtaining a copy of the judgment shall also be excluded. The object of this rule of exclusion is to give the litigant an effective and adequate opportunity to peruse and consider the reasonings and the findings in the judgment as well as the terms of the decree so that he can reach a final decision as to whether he should take up the matter to the higher Court. To put it negatively, the obvious intendment of this provision is that a litigant should not be bustled into taking a decision as to the further steps he should take with regard to the judgment and the decree. This section is not the compliance of a mere technicality, but is in recognition of a matter

1. I.L.R. (1967) 1 Mad. 64 : (1966) 2 M.L.J 380.
2. A.I.R. 1915 Mad. 493.
3. A.I.R. 1966 S.C. 1713.
4. (1928) I.L.R. 6 Rang. 302.

of substance founded upon principles of natural justice that a litigant who prefers an appeal as an aggrieved party, must be afforded all opportunities to know for himself, how and in what manner a judgment and decree of Court, had affected his rights. The interpretation of this salutary provision should therefore be in consonance with this basic juristic concept. Unlike section 5, which confers a discretionary power in the Court under section 12, the Court is not given any discretion and the litigant is entitled as of right to the exclusion of the period, provided the conditions laid down in the section are satisfied. This right of exclusion confers a valuable substantive right upon the party and the Court cannot impose upon the litigants salutary right any condition or restriction not warranted by the section. That this right of exclusion is a matter of substance is also evident from the fact that the time requisite for obtaining the copy of the judgment as well as the copy of the decree is to be excluded. A litigant requires the judgment to know the findings and the reasonings of the Court. He equally requires a copy of the decree to properly appreciate the repurcussions of the decree, upon his rights, financial, property personal, etc., etc. In innumerable cases where the array of parties on both sides is numerous and where competing adjustments and equities have to be worked out, it is only on a careful perusal of the decree that a litigant can properly appreciate in what manner he is aggrieved by the decree. It is because of this principle, that the decisions have taken the view that a litigant is as of right entitled to apply for copies of judgment and decree at different times and that the rule of exclusion has to be determined by applying the principle of combined calculation—*vide Silamban Chetty* v. *Ramanathan Chetty*[1], and *Vellayammal Bibi and others* v. *Koolayanan Rowthan*[2], The words "the time requisite" used in the section do not mean 'requisite for preferring an appeal or an application for leave to appeal or review of a judgment, but they mean and refer to the time requisite for obtaining the copies. In *Ram Kishan Siwastari* v. *Kashi Bai*[3], it was held that the words "the time requisite for obtaining copies" are not confined to cases where the person appealing has in person or by a properly authorised agent, applied for a copy of the judgment and the decree. The reasoning of Knox J., was that he was not prepared to read into section 12 of words "when the copies applied for by the party appealing or on his behalf and with the intention of appealing.' On Letters patent Appeal, this view was affirmed by Stanley, C.J., and Burkitt, J., in the following words:

> "The language in section 12 is very general. It provides that the time requisite for obtaining a copy of the decree shall be excluded in the computation of time. The section does not say by whom the copy is to be obtained, nor does it introduce the words which have been suggested as necessarily embodied in the section showing that the copy must be obtained for the purpose of an appeal."

This reasoning has been followed and referred to with approval in latter decisions of the various Courts. It is sufficient to refer to the Bench decision of this Court in *Aminuddin Sahib* v. *Pyari Bi*[4], which has followed the Allahabad decision above mentioned. This rule of exclusion is a positive mandatory direction for exclusion of time and contains no reference to the Code of Civil Procedure or rules made by the Court under section 122 of the Code. The positive direction for exclusion contained in section 12 cannot in any manner be controlled by the rules framed either under the Civil Procedure Code or under other statutes either requiring a memorandum of appeal to be accompanied by a copy of judgment or decree or dispensing with such a requirement making it unnecessary. The right of exclusion will have to be determined upon a strict grammatical construction of the section, influenced by the only consideration that the time which is requisite is the time requisite for obtaining a copy of the judgment or the decree. One can easily visualise a litigant applying for a copy of judgment (all the while thinking that the ultimate decision was in his favour) consisting of inter-connected findings on several issues,

1. (1910) I.L.R. 33 Mad. 256 : 21 M.L.J. 152.
2. (1921) 41 M.L.J. 273.
3. (1907) I.L.R. 29 All. 264.
4. (1920) I.L.R. 43 Mad. 633 : 38 M.L.J. 340.

some against him and some in his favour. At that time when he applied for copy of the judgment, the litigant may not have any intention of preferring an appeal being under the *bona fide* impression that the judgment was in his favour, and yet he would desire to have a certified copy, merely for purposes of his record; but on a careful perusal of the judgment he may find his views about the effect of the decision were wrong and he may decide to prefer an appeal. It cannot for a moment be urged that there cannot be exclusion of time under section 12, because of the fact that at the time when he applied for copies, he had no intention of appealing. To take another illustration, a litigant may apply for a copy of judgment and decree with a view to prefer an appeal either to the District Court but after obtaining copies of the judgment and decree he would have realised that the appeal should be preferred to the High Court. It is impossible to argue that the copy of the judgment was secured for a particular purpose, *viz.*, preferring an appeal to the District Court or Sub-Court, and the time taken for securing that copy cannot be exclused because the purpose for which it was ultimately used was different, *viz.*, an appeal to the High Court. To take another illustration the party aggrieved may apply for certified copy of the judgment and decree with a view to file an application for review of judgment, but after perusing the judgment, he may be advised that the proper course would be to prefer an appeal. The situation also may be *vice versa, i.e.*, getting copies for preferring an appeal but ultimately filing a review petition. It cannot be contended that because of the purpose for which the copy was secured was different from the purpose for which it was used, there cannot be any exclusion of time under section 12. It is unnecessary to multiply instances, showing how the object of the rule of exclusion would be easily defeated if we read into the section, as a necessary part of it, the intention of an appeal or the particular appeal then contemplated. The rules of procedure cannot control the mandatory provision in section 12. When an appeal is presented, the Court has only to consider whether according to the rules of procedure there has been a proper presentation complying with all the formalities. In some cases, according to the relevant rules, the filing of a copy of judgment or the decree may or may not be necessary. That requirement has nothing to do with this question of limitation. It is only after the appeal is declared as properly presented that the question of limitation arises. It is in this context that the rule of exclusion contained in section 12 must be construed.

The settled practice of this Court to dispense with production of printed copies of judgment in a batch of appeals arising out of a common judgment rests essentially upon a commonsense point of view of the matter. When in the main appeal, 12 printed copies have been filed, there is really no point and it is meaningless to require a similar set of 12 copies of printed judgment in each appeal. It is useless expenditure and it does not serve any purpose. What the litigant has done in one case is regarded as sufficient compliance of rules of procedure and the Court readily passes the appropriate order dispensing with the filing of the copies of the judgment. This established practice virtually amounts to adding a proviso as it were, to Order 41 rule 1 Civil Procedure Code, that in the case of a batch of appeals arising out of a common judgment, it is sufficient that the requisite number of copies are filed in one main appeal. This is the principle or irrationale underlying this long established practice.

We shall now examine the relevant decisions culminating in the decision of the Privy Council in *Surty's case*[1], on the question of the litigants rights to exclusion of time, under section 12 when the rules governing appeals do not require copies of judgment to be filed along with the memorandum of appeal. The ratio underlying these decisions would equally apply to cases where the Courts following the established practice dispenses with the production of copies of judgment. Obviously both the cases must be governed by the same rule. On this aspect, there was difference of opinion, the Madras High Court and the Rangoon High Court taking the view that when the rules do not require a copy of the judgment to be filed, the appel-

1. (1928) I.L.R. 6 Rang. 302.

lant is not entitled to a deduction under section 12 while the Allahabad, Bombay and Calcutta High Courts took the view that the appellant was entitled to the deduction.

In *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*[1], the question arose in connection with an appeal under the Rent Recovery Act; the appellant claimed that the time occupied in procuring a copy of the judgment should be deducted. But this contention was rejected by the Bench, following earlier decisions of this Court. Collins, C.J., observed that section 69 which provides for the right of appeal did not require the appellant when filing an appeal to furnish therewith a copy of the decree and judgment appealed against and the right of exclusion provided in section 12 of the Limitation Act would apply only where it is necessary to file with such appeal, a copy of the decree or judgment. A similar view was taken in *Abu Backer Sahib* v. *Secretary of State for India*[2], in an appeal arising under the Forests Act, where too it was not necessary to file a copy of judgment or decree along with the appeal. Arnold White, C.J., at page 509, has observed that section 12 of the Act would not apply when the special enactment which gives a right of appeal does not require that the memo. of appeal should be accompanied by a copy of the order appealed against.

In *J. H. Surty* v. *T. S Chetyar Firm*[3], Surtys case which was reversed by the Privy Council in *J. H. Surty* v. *T. S. Chettyar a Firm*[4], the appellant filed an original side appeal waiting till he obtained a certified copy of the decree but the Bench dismissed the appeal as barred by limitation. The application filed by the appellant to excuse the delay under section 5 of the Limitation Act on the ground that he was suffering under a *bona fide* mistake in thinking that the copy of the decree was necessary, was also rejected. Later on, the appellant filed an application for review of the prior decision on the ground that he would be entitled (under section 12) to deduction of the time taken for securing a copy of the decree, even though the rules provide that the memorandum need not be accompanied by a certified copy of the decree and that this aspect by oversight was not mentioned by him before the Bench on the earlier occasion. The Bench admitted the review application but at the final hearing, dismissed the same holding that the appeal was barred by limitation on the ground that the appellant would not be entitled to a deduction of the time requisite for obtaining copy of the decree when the rules of the Court do not require a copy to be filed, but also further provide that the memorandum of appeal need not be accompanied by a certified copy of the decree. The decision in the review application was rendered by Rutledge, C.J., and Chari J., in pages 277 to 283. The point posed for determination was whether it could be said that the time was requisite for obtaining a copy of the decree when there was no obligation on the appellant to file a copy of the decree along with his memorandum of appeal. The Bench referred to the divergence of opinion amongst the various Courts. After referring to the following definition of the expression 'requisite' in the Century Dictionary:

"(1) required by the nature of things or by circumstances;

(2) necessary;

(3) so needful that it cannot be dispensed with.

(4) indispensable,"

the Bench held that it cannot be said that when no copies at all, are needed for the purpose of filing appeals in accordance with law, any time is 'requisite' *i.e.*, is indispensably necessary for obtaining copies. The matter went on appeal before the Privy Council in *J. H. Surty* v. *T. S. Chettyar a firm*[4], The Privy Council referred

1. (1897) I.L.R. 20 Mad. 476.
2. (1911) I.L.R. 34 Mad. 505: 20 M.L.J. 283. (F.B.)
3. (1926) I.L.R. 4 Rang. 265.
4. (1928) I.L.R. 6 Rang. 302.

to the divergent views, the view of the Allahabad, Bombay and Calcutta High Courts that the appellant would be entitled to invoke section 12 even in cases where rules of the Court do not require copies of the judgments to be filed as well as the view of the Madras High Court in *Kumara Akkappa Nayanim Bahadur* v. *Sithila Naidu*[1] and *Abu Backer Sahib* v. *Secretary of State for India*[2], and held that the correct and the sounder view was that section 12 would apply and that that is the preponderance of judicial opinion. It is necessary to extract the following observations of Lord Phillimore at pages 309 and 312 to 314.

"It is therefore not necessary on an appeal to the appellate side that the memorandum of appeal should have both documents annexed to it. And if the only reason for excluding the time for procuring these documents was that they were necessary to the presentation of the appeal, it might be said that the provisions of section 12 could not have been meant to apply to such a case.

Even so, however, there would be a difficulty in dealing with the grammatical construction of the words but their Lordships, if they had found a consistent course of practice, would have been disposed to accept the construction put upon them by the High Court of Rangoon. When however, the matter comes to be examined, it is found that there have been divergencies of opinion in the several High Courts, and that the more prevalent opinion is not that which has been taken by the High Court of Rangoon.

The result, as has been already stated is that the preponderance of practice is in favour of the appellant.

Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation. Section 12 makes no reference to the Code of Civil Procedure, or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction.

If, indeed it could be shown that in some particular class of cases there could be no object in obtaining the two documents, an argument might be offered that no time could be requisite for obtaining something not requisite. But this is not so. The decree may be complicated, and it may be open to drawn it up in two different ways, and the practitioner, may well want to see its form before attacking it by his memorandum of appeal. As to the judgment, no doubt when the case does not come from up country, the practitioner will have heard it delivered but he may not carry all the points of a long judgment in his memory and as Sir John Edge says, the Legislature may not wish him to hurry to make a decision till he has well considered it.

There is force no doubt in the observation made in the High Court that the elimination of the requirement to obtain copies of the documents was part of an effort to combat the dilatoriness of some Indian practitioners; and their Lordships would be unwilling to discourage any such effort. All, however, that can be done as the law stands, is for the High Courts to be strict in applying the provision of exclusion.

The word 'requisite' is a strong word; It may be regarded as meaning something more than the word required. It means 'propertly required,' and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default."

Despite this very clear pronouncement of the Privy Council, some of the High Courts still took the view that if the rules do not require copy of judgment to be filed, a party would not be entitled to a deduction of time under section 12 as unfortunately in these cases, the attention of the learned Judges was not drawn to the decision in *Surty's case*[3]. The result was that when the identical question again came before the Supreme Court, in *Additional Collector of Customs* v. *Best & Co.*[4], The Supreme

1. (1897) I.L.R. 20 Mad. 476.
2. (1911) I.L.R. 34 Mad. 505 : 20 M.L.J. 283 (F.B.).
3. (1928) I.L.R. 6 Rang. 302. (P.C.)
4. A.I.R. 1966 S.C. 1713.

Court referred to the decision in *Surty's case*[1] and expressly approved the same declaring that the statement of law by Lord Phillimore was undoubtedly correct and ound statement of law. While dealing with the decisions of some of the High Courts hich had taken the other view the Supreme Court has adverted to the fact that the attention of Courts concerned was not drawn to the decision of the Privy Council in *Surtys' case*[1]. In the case before the Supreme Court, the applicants applied for a certificate under Article 133 of the constitution for preferring an appeal to the Supreme Court from the decision of the High Court. The applicants first filed the application along with the certified copy of the judgment; later on, they were furnished with a copy of the decree which however, they did not annex to their application. The High Court dismissed the application as barred by limitation observing that the application would be in time if the copy of the decree subsequently obtained was annexed to the application as soon as it was obtained or if the applicants had waited till they obtained the copy of the decree and then filed the application. It was also observed that if they had withdrawn the application and filed a fresh application annexing the certified copy of the decree, the application would be in time. The substance of the view of the High Court (which was referred by the Supreme Court) was that when the copy of the decree was not filed, it could not be said that time was requiste for obtaining such a copy within the meaning of section 12 especially when the Calcutta High Court rules provided that it was not necessary to file the copy of the judgment or decree along with the appeal. The Supreme Court did not accept this view. The Supreme Court has in extenso referred to with approval the statement of the law in *Surty's case*[1]. The question which the Supreme Court posed for decision was whether the provision for exclusion of time under section 12(2) was dependent upon whether the rules of the Court permitted a litigant to file an application for leave with or without a copy of the judgment or decree and the answer was that the party would be entitled to exclusion of time irrespective of the rules of Court which permit the party to file an appeal without annexing a copy of judgment or decree to the memorandum of appeal. One crucial aspect which requires to be noticed in this decision of the Supreme Court is the context in which the decision of the Calcutta High Court in *Imperial Bucket* v. *Sm. Bhagawati Basak*[2], was referred to. In the Calcutta decision the litigant had annexed a certified copy of the judgment appealed from to the memorandum of appeal, even though under the rules no certified copy was required and the time under section 12 was excluded. The Supeme Court observed :

> " This decision does not necessarily mean that where a copy is applied for and obtained it was for a thing not requisite. As the Privy Council observed, a party might like to examine the judgment or the decree or the order before he challenged it in a higher forum. Though the judgment states that such time would be excluded where the copy is annexed, it does not lay down that there can be no exclusion of time where it is not annexed."

This clear pronouncement of the law consists of two parts (1) The word ' requisite ' used in section 12 means and refers to the time rquisite for obtaining of the judgment and not requisite for filing the appeal, for the obvious reason that the copy of the judgment or decree cannot be said to be requisite when the rules say that copies need not be filed. (2) The litigant would be entitled to the exclusion of time, even when he has obtained a copy but had not annexed the same to the memorandum of appeal. As observed earlier, we are of the view that the same rule should apply to cases where the rules provide that the memorandum of appeal should be accompanied by a copy of the judgment with a power in the Court to dispense with the same.

We shall refer to the earlier Bench decision of this Court reported in *Avudia Ammal* v. *Ganapathi*[3], which has been followed in *State of Madras* v. *Mohamed Sirajudeen*[4]. In the earlier Madras Bench decision, the District Judge dismissed a

1. (1928) I.L.R. 6 Rang. 302 (P.C.).
2. A.I.R. 1954 Cal. 320.
3. A.I.R. 1915 Mad. 493.
4. (1966) 2 M.L.J. 380: I.L.R. (1967) 1 Mad. 64.

connected appeal on the ground that it was barred by limitation as the memorandum of appeal was not accompanied by a copy of the judgment which however had been filed in the other connected appeal. The appellant preferred a second appeal against this decision of the District Judge and on his behalf it was argued in the High Court that the District Judge should have dispensed with the production of the judgment. The High Court observed, that even so, the appellant could not claim the deduction of any period as required for obtaining a copy of the judgment, as no time could be required or could have been spent in obtaining copy of the judgment when such copy was dispensed with. It was also held that the time spent in obtaining a copy of the same judgment for purpose of filing a different appeal in another suit, though dealt with by a common judgment cannot legally be excluded under section 12. It has to be noticed that this Bench decision follows and is coloured by the then state of law in Madras, vide *Kumara Akkappa Nayanim Bahadur* v. *Sithala Naidu*[1] and *Abu Backer Sahib* v. *Secretary of State for India*[2], (even though not referred to as such in the judgment of the Bench) to the effect that time for obtaining copies of judgment or decree cannot be said to be requisite when the same need not be filed along with the memorandum of appeal or the same is dispensed with. From what we have observed earlier, there can be no doubt about it that after the decision of the Privy Counsil in *Surty's case*[3], the principle of this decision cannot be followed. We may also add that if the attention of the learned Judges who decided the case in *State of Madras* v. *Mohammed Sirajudeen*[4], had been drawn to the decision in *Surty's case*[3], they would have noticed that the earlier Bench decision in *Avudai Ammal* v. *Ganapathi*[5], is no longer good law. With great respect, we are unable to agree with the view of Sadasiva Aiyar, J. in the above decision that the time spent for obtaining a copy of the common judgment for the purpose of filing one appeal cannot be legally excluded in computing the period of limitation for filing the other connected appeal, arising out of the same common judgment. While interpreting the language in section 12, we have already stressed that the section does not talk of any particular appeal nor even the intention of the appellant and that the time requisite is only to enable the appellant, the aggrieved party to know the findings and the reasonings in the judgment and the terms of the decree. When the application for copy of the judgment is made, it is so done with a view to enable the aggrieved party to know the effect of the judgment in all the cases decided against him and not in respect of any particular case or any particular appeal proposed to be filed by him. In the context, it is impossible to restrict and confine this copy application only to one case as though the party concerned did not desire to peruse the judgment in respect of the other case and has no idea of preferring appeals in respect of the other cases. His need or necessity for perusing the judgment for which he filed the application cannot in the nature of things be dissected so as to say that because one appeal was filed earlier, the application must be retrospectively held to relate to that particular appeal. How can it be doubted that when the application is filed, it was motivated by one common single intention or object of preferring as many appeals as may be advised in the light of the information conveyed by the judgment? When the established practice is to dispense with the production of similar sets of copies of judgment in the connected appeals, it is implicit, in such practice, that the copy which was obtained and was filed in one appeal can be used for the purposes of the other appeals. It is impossible to take any other view. With regard to the other appeals filed how will this Court know, what the reasonings and findings are, in regard to those points which are in dispute in the other appeals except by perusing the judgment already filed in the main appeal? Where there is that obvious need and necessity (for the appellate Court as well as for the litigant) for using and perusing the common judgment which has been filed in the main appeal, how can it be said that the time taken for obtaining copies of these judgments cannot be said to be requisite for computing the period of limitation for the other appeals also? With respect, we are of the

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1. (1897) I.L.R. 20 Mad. 476.
2. (1911) I.L.R. 34 Mad. 505 : 20 M.L.J. 283 (F.B.).
3. (1928) 54 M.L.J. 696 : L.R. 55 I.A. 161 : A.I.R. 1928 P.C. 103.
4. I.L.R. (1967) 1 Mad. 64 : (1966) 2 M.L.J. 380.
5. A.I.R. 1915 Mad. 493.

opinion that the view taken in the Bench decision of the Patna High Court *Mt. Ribi Umtul Rasul* v. *Ram Charan*[1], is the correct view. In that case, there was a batch of six appeals arising out of a common judgment and the copies were filed in the main appeal. Following the standing practice of that Court, similar sets of printed copies of judgment were not filed in the other appeals. The Bench held that by reason of section 12 all the appeals were in time. The Bench first observed (following the decision of the Allahabad High Court in *Wajid Ali Sha* v. *Nawal Kishore*[2], that the period of deduction under section 12 would apply even in cases where the memorandum of appeal need not be accompanied by the copy of the judgment or decree. It further observed that the copy of the judgment which was obtained must be deemed to be obtained for the purpose of each of the appeals and should not be confined to any particular appeal.

It will be useful to extract the following observations :

"It was known to the plaintiff that one copy only of the judgment would be necessary for the purpose of prosecuting the six appeals. It was not necessary for her to obtain six copies because it was well known what the practice of the Court was, namely that one copy alone in such a case as this would be required. Therefore it seems to me that in obtaining that copy of the judgment it cannot be said that she obtained it for the exclusive purpose of any one particular appeal. A copy of the judgment was in fact obtained for the purpose of each of those appeals and it was obtained as much for the purpose of enabling the appellant to consider it as for the purpose of filing it with the memorandum of appeal which would have to be done in one at least of the cases ; so that in my opinion the copy of the judgment in this case was obtained as much for the purpose of three appeals which it is contended are now out of time as it was for the purpose of the other appeals, and I think that in these circumstances the case is one which comes within the operation of section 12, clause (3), Limitation Act."

With respect, we are clearly of the view that this statement is correct law, besides being in complete accord with the practice and commonsense view of the matter. In the Bench decision in *State of Madras* v. *Mohammed Sirajudeen*[3], this Bench decision of the Patna High Court was distinguished on the ground that it rested upon the practice of the Patna High Court that only one certified copy of the judgment in the case of batch of appeals need be filed. With great respect to the learned Judges, we are of the view that even if the practice in the Patna High Court formed the main basis of the Bench decision of that Court, for that very reason that decision must have been followed and not distinguished. In the first place, the practice in this Court has also been to dispense with the production of similar sets of copies of the judgment in the batch of appeals arising out of a common judgment. In the Patna High Court, in pursuance of the rules of practice copies of the judgment were filed only in one appeal and there was no formal application for dispensing with and 'dispensing with' is presumed under Order 41, rule 1, Civil Procedure Code. In our Court the same thing is done except the difference that a petition to dispense with is also filed. This cannot make any difference at all as this Court dispenses with copies of judgment only because of the established practice which means the party aggrieved is not required to apply for as many sets of printed copies of judgment as there are appeals to be filed. The very idea of dispensing with as a settled practice carries with it the notion that the litigant must be deemed to have done whatsoever is necessary and he is not guilty of any default or omission if he applies for only one set of copies. As observed by Venkatasubba Rao, J., in *Rameshayya* v. *Venkatarathnam*[4], the section has to be interpreted in the background that the idea of reasonableness is inherent in the provision. We may also refer to the recent decision of the Supreme Court reported in *State of U.P.* v. *Maharaja Narain*[5], where interpreting provisions

1. A.I.R. 1920 Pat. 535.
2. (1895) I.L.R. 17 All. 213.
3. I.L.R. (1967) 1 Mad. 64 : (1966) 2 M.L.J. 380.
4. (1938) 2 M.L.J. 283 : A.I.R. 1938 Mad. 823.
5. (1968) 2 S.C.J. 564 : (1968) M.L.J. (Crl.) 604 : A.I.R. 1968 S.C. 960.

of section 12 the Supreme Court has emphasised that the party concerned should be entitled to deduction if he has done everything which the state or rules of practice require him to do and is not guilty of any default in the steps to be taken by him in accordance with law.

To sum up, we are of the view that at its inception when the litigant applies for a copy of the common judgment, he thinks of the entire batch of suits and it is to know in respect of the entire batch of suits the reasonings and findings of the Court and how far they are against him in respect of the points in controversy. When he pays the requisite charges, it is in respect of the same common purpose. In the third stage, when he obtains the copy from the Court, it is for the same purpose and when he peruses the judgment and when he is advised it is in respect of all the cases. Start to finish whatever the litigant has do, is so much for one case as for the others and it is not exclusively for one case leaving out the other cases with the result that the appellant would be entitled to deduction of time on the plain language of section 12 in respect of all the appeals. The fact that one appeal is preferred filing the copies of judgment cannot retrospectively have the effect of nullifying all the prior steps taken by him, which undoubtedly were for a common purpose. There is nothing in the language of section 12 to interpret it in such a restricted manner. In this connection we may also refer to the following rule formulated by Rajamannar, C. J., in the Full Bench case in *Kandaswami Pillai* v. *Kannappa Chetty*[1].

> "Though it is true that in construing statutes of limitation considerations of hardship and anomaly are out of place, it is, I think, permissible to adopt a beneficient construction of a rule of limitation if alternative constructions are possible."

It only remains to advert to the offshoot or the consequences of the decision in *State of Madras* v. *Mohammed Sirajudeen*[2], which also indicate that that decision requires reconsideration. It is familiar knowledge that copies of decrees are furnished to the litigants much earlier and the appeal would be in time only if the time taken for securing the judgment is deducted. The effect of the Bench decision is that time cannot be reckoned with reference to the copy of the judgment obtained and filed in one case. The delay cannot be excused after this decision lying down this law, because the litigant cannot plead ignorance of law. In fact in one of the appeals Mr. Sivamani learned Counsel for the respondent raised an objection urging that under section 5 of the Limitation Act the delay cannot be excused but did not press the point further, on verification of the relevant dates. Hereafter, the litigant cannot with any justification invoke section 5 and he must apply and secure as many sets of printed copies of judgment as there are appeals to be filed ; virtually it means that the established practice and the power of dispensing with under Order 41 rule 1 become useless, it is too much to speculate as to what would happend to an application under section 5 to excuse the delay, in individual cases, as it would depend upon the attitude of the particular judge or the judges before whom the application may come up. On the other hand, if it is to be presumed that in such cases there should also be a practice that applications filed under section 5 should be excused, like the practice of dispensing with, it virtually amounts to recognising that the time taken in respect of obtaining one set of printed copies should be excluded in all the appeals under section 12. Otherwise, it will result in this anomaly, that for obtaining an order for dispensing with the party litigant is presumed to have done whatever is necessary when he applied for only one set of printed judgment, but for the purpose of limitation, what he had done is not sufficient. In other words, when both the statutes the Limitation Act and Order 41, of the Code of Civil Procedure are to be applied together one complementary to the other, as governing the procedure of appeals, the two statutes will be producing contradictory or inconsistent results. This is another crucial aspect which also will have to be taken into account.

For all these reasons, we are of the view that there should be an authoritative decision of a Full Bench on the question whether in a common judgment disposing

1. I.L.R. (1952) Mad. 421. 380.
2. I.L.R. (1967) 21 Mad. 64 : (1960) 2 M.L.J.

of a batch of suits or appeals, a party will be entitled to the deduction of time under section 12 of the Limitation Act in respect of all the appeals, though he had obtained only one set of copies of judgment. We direct the papers to be placed before the learned Chief Justice for necessary directions.

In pursuance of the aforesaid reference these petitions came on for hearing before the Full Bench.

G. Ramaswami, the Additional Government Pleader on behalf of the Petitioner (in all the petitions).

N. Sivamani, Advocate, for Respondent in C.M.P. Nos. 13533 and 13535 of 1967.

P. S. Srisailam, for Respondent in C.M.P.No. 13534 of 1967 and for the Second Respondent in C. M. P. No. 13540 of 1967.

N. K. Ramaswami, for Respondent in C. M. P. No. 13543 of 1967.

The Order of the Court was made by

Veeraswami, C.J.—The question we are called upon to answer is whether the benefit of exclusion of time under section 12 (2) of the Indian Limitation Act, 1908, is available to each of the appeals, which are all directed by the same appellant against a common judgment disposing of together certain connected land acquisition references or, to only one of the appeals in which alone certified copies of the judgment and decree were filed along with the related memorandum of appeal. The common judgment of the Court below was dated 2nd December, 1965 and an application for a copy thereof and of the decree was made on 6th December, 1965. The copies of the judgment and decrees were delivered to the appellant on 15th April, 1966 and the appeals were filed on 4th July, 1966.

There is no dispute that so far as the appeal in which the copies of the judgment and decree were filed is concerned, it was in time, having regard to the time to be excluded in furnishing the copies. We may mention that certified copies of the decrees were filed in each of the appeals, but, applications were filed to dispense with production of copies of the judgment in the appeals except in the main one in which, as we said, they had been produced. These applications have since been allowed. On the assumption that these appeals, except the main one, were out of time, applications also were taken out for excusing the delay in filing them. Evidently this procedure was followed because of *The State of Madras* v. *Mohammad Sirajudeen*[1], which was decided by two of us constituting a Division Bench. Venkataraman and Ramamurthi, JJ., before whom the applications went up for disposal, being of the view that *The State of Madras* v. *Mohammed Sirajudeen*[1], required reconsideration, they have referred the matter to a Full Bench for an authoritative decision on the point, to writ, whether in appeals arising from a common judgment disposing of a batch of suits a party will be entitled to exclusion of time under section 12 of the Limitation Act in respect of all the appeals, though he had obtained only one set of copies of judgment.

The State of Madras v. *Mohammad Sirajudeen*[1], expressed the view that the time for preferring an appeal should be calculated on the endorsements on the copies of judgment produced in each of the appeals, even if they were filed in a batch and in one of them such copies were produced and in the rest their production was dispense with. At the same time it was felt in that case that delay, in such cases, might, however, be excused in the circumstances. The correctness of this view has been examined by us and we are of opinion that, on a proper construction of section 12 (2) and (3) and of the principles evolved by some of the decided cases relevant to the question, the view in *The State of Madras* v. *Mohammad Sirajudeen*[1], does require modification.

Section 3 of the Limitation Act directs that any appeal preferred after expiry of the period of limitation prescribed therefor by the First Schedule should be dismissed. Part III contains the procedure computation of the period of limitation and section 12 allow exclusion of time in the computation. In computing time the

1. I.L.R. (1967) 1 Mad. 64 : (1966) 2 M.L.J. 380.

day from which the period is to be reckoned has to be excluded. Sub-section (2), which is in point here, is

> " In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application of a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of decree, sentence or order appealed from or sought to be reviewed, shall be excluded."

The next sub-section says that where a decree is appealed from or sought to be reviewed the time requisite for obtaining a copy of the judgment, on which it is founded, shall also be excluded. On a careful reading of these provisions it is evident that they are not in any way qualified or limited in their application by anything outside those provisions. The direction by those provisions is that in computing time for purposes of exclusion the day on which the judgment appealed against was pronounced and the time required for obtaining a copy of the decree as well as of the judgment should be taken into account for exclusion. The provisions are silent as to who should apply for such copies or whether they should at all be filed along with the appeals. But Order 41, rule 1 of the Code of Civil Procedure, as in force in this State, requires that every memorandum of appeal should be accompanied by a copy of the decree appealed from and also a copy of the judgment. This requisite, except as to the decree, is not an inflexible rule, as the Court has the power to dispense with the production of copies of the judgment. This provision of the Code, however, is obviously unrelated to section 12 of the Limitation Act and cannot be understood, in our view, as enjoining that exclusion for computation of time for limitation for an appeal should only be based on the endorsements in the certified copies of the judgment necessarily to be filed therewith. Order 41, rule 1 of the Code of Civil Procedure is limited to the procedure in filing an appeal and is concerned with the form of the memorandum of appeal and the enclosures thereto. That rule has nothing to do with the exclusion of time which is entirely dependent on section 12 of the Limitation Act. The result of this view of the scope of section 12 of the Limitation Act and Order 41, rule 1 is that there is no interdependence or connection between them so that whether or not an appellant is entitled to exclusion of time will not depend upon any requisition for filing of copies of judgment and decree in an appeal, though of course exclusion of time has to be determined in the light of endorsements on the certified copy of the judgment or the decree, or both, as the case may be, as to the time taken in supplying them.

Where, therefore, several appeals arise from a common judgment and they have been filed by the same party, there is nothing to prevent him from relying on a copy of the judgment or decree, or both, filed in only one of them, for exclusion of time in computing limitation for each of such appeals. For that purpose the party concerned is not required by section 12 (2) to file copies of the judgment and decree along with the memoranda of any of the appeals. That requisite, as we said, flows not from the provisions of the Limitation Act but from the procedure prescribed by Order 41, rule 1 of the Code of Civil Procedure. The idea in allowing exclusion of time for computation of limitation is to allow the party concerned time to consider whether he is called upon to file an appeal. If that is borne in mind, we do not see why a copy of the judgment and decree filed in one of the appeals cannot be made use of for purposes of getting exclusion of time in the other connected appeals filed along with it simultaneously by the same party. If in such appeals it is shown with reference to the endorsements on the copies of the judgments and decrees that by the exclusion of time warranted by them the appeals are in time, the requirement of the Limitation Act is satisfied. On that view no question of limitation will, therefore, arise in the appeals. Dispensation of production of copies of the judgments is called for only because of Order 41, rule 1 of the Code of Civil Procedure.

The view we have just expressed, which is based on a reading of section 12, is also, as it seems to us, in consonance with the decided cases. *Jijibhoy N. Surty* v. *T.S. Chettyar*[1], though not concerned with appeals from a common judgment, laid

1. (1928) 54 M.L.J. 696 : L.R. 55 I.A. 161 : A.I.R. 1928 P.C. 103.

down, on a construction of section 12 (2) of the Limitation Act, that this section was not qualified by the Code of Civil Procedure or any other Act, but contained an independent direction for exclusion of time. The Privy Council there rejected a contention that because no enclosure was required by the procedural rules to be filed of copies of the judgment and decree along with a memorandum of appeal, it followed that limitation should be computed without exclusion of time taken for obtaining those copies. Dealing with that question, the Board observed :

"Their Lordships have now to return to the grammatical construction of the Act, and they find plain words directing that the time requisite for obtaining the two documents is to be excluded from computation. Section 12 makes no reference to the Code of Civil Procedure or to any other Act. It does not say why the time is to be excluded, but simply enacts it as a positive direction."

The object of the exclusion, said the Privy Council, was that counsel or the party should have time to decide with reference to a copy of the decree and judgment whether it was necessary to file an appeal.

The view of the Privy Council that section 12 (2) of the Limitation Act operates irrespective of the Code of Civil Procedure has been approved by the Supeme Court in *Additional Collector of Customs* v. *M/s. Best & Company*[1]. This is what the Supreme Court stated :

"As the Privy Council has laid down the provisions of section 12 (2) and (3) are a positive direction excluding the time taken for obtaining a copy of the judgment and decree or order as the case may be and those provisions are irrespective of the Code of Civil Procedure or the rules made by a Court under section 122 of the Code."

We are aware that neither of these two cases related to appeals from a common judgment, but, all the same, the principle is well established by them that exclusion of time under section 12 (2) of the Limitation Act has no relevance and is not in any way related to the requirement of filing copies of judgments and decrees along with the memoranda of appeals.

Mr. Bibi Umtul Rasul v. *Ram Charan*[2], is directly in point here as it was concerned with the case of several appeals filed by the same party against a common judgment. The Patna High Court held that where more appeals than one were presented by the same appellant from the same judgment but with only one certified copy of the judgment enclosed with one of the appeals, they should all be held to be in time if the one with the enclosures was found to be in time. In support of this view, the Court relied on its own practice, but, obviously, this practice is certainly in consonance with the law. The Patna High Court pointed out,

"In such a case the time requisite for obtaining a copy of the judgment would be excluded under section 12 (3) in computing the period of limitation in respect of all the appeals filed by the appellant, although only one copy of the judgment is filed for all the appeals."

The State of Madras v. *Mohammad Sirajudeen*[3], had but followed an earlier Bench decision in *Avudai Ammal* v. *Ganapathi*[4] ; Sadasiva Aiyar and Tyabji, JJ., in *Avudai Ammal* v. *Ganapathi*[4], were of the view that an appellant was not entitled to a deduction of the time taken in obtaining copies of judgments filed in another connected appeal. The basis for this view was the consideration that the requirement of Order 41, rule 1 was related to the application of section 12 (2) and (3) of the Limitation Act. Sadasiva Aiyar, J., expressed his opinion thus :

"Order 41, rule 1, Civil Procedure Code, requires the appeal memorandum to be accompanied by a copy of the judgment unless the appellate Court dispenses therewith. No such dispensation was given and hence there was an irregular

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1. (1966) S.C.R. (Supp.) 46 : A.I.R. 1966 S.C. 1713.
2. A.I.R. 1920 Pat. 535.
3. I.L.R. (1967) 1 Mad. 64 : (1966) 2 M.L.J. 380.
4. A.I.R. 1915 Mad. 493.

presentment of the appeal on 27th July, 1910, to the District Court. Assuming however that the presentation of the copy of the judgment was dispensed with by the appellate Court the appeal was presented long out of time. The appellant could not claim the deduction of any period as required for obtaining a copy of the judgment, as no time could be required or could have been spent in obtaining copy of the judgment when such copy was dispensed with.

The time spent in obtaining a copy of the same judgment for purposes of filing a different appeal in another suit (though it was a connected suit disposed of with the present suit by a single judgment) cannot legally be excluded in computing the period of limitation for filing this appeal."

Tyabji, J., concurred in that view. But, with respect, we may point out that no attempt was made in that case to determine the true scope and effect of section 12 (2) and (3); in fact, no reference was even made in the judgment to the section. As the privy Council pointed out in *Jijibhoy N. Surty* v. *T.S. Chettyar*[1], the learned Judges lost sight of the true position that exclusion of time for purposes of limitation was not in any way controlled or affected by the requirements in the Code of Civil Procedure of filing of certified copies of judgment and or decree with the memoranda of connected appeals from a common judgment.

In the course of the argument before us the discussion was widened to the proposition that once a certified copy of the judgment and decree furnished the basis for exclusion under section 12 (2) and (3), it would enure to the benefit of not merely the appellant who had secured them but also to other parties to the judgment appealed against, whether or not they filed appeals together or separately on the same day or different dates. Having regard to the limited scope of the reference before us, in the light of the facts, we do not think it necessary to cover that area and express our view. It will suffice to say that *Aminuddin Sahib* v. *Pyari Bi*[2], and *Ram Kishan Shastri* v. *Kashi Bai*[3], do not, as we are inclined to think, contribute to such a proposition. In the first of these cases all that was held was that an appellant was required to file with his memorandum of appeal copy of the decree appealed from, might file a copy obtained by another party and that under section 12 (2) of the Limitation Act he was entitled to a deduction of the time taken to obtain that copy. In *Ram Kishan Shastri* v. *Kashi Bai*[3], it was held that the words "the time requisite for obtaining a copy" in section 12 (2) and (3) were not confined to cases where the person appealing had in person or by a properly authorised agent applied for a copy of the judgment or decree. But that is not the question under our consideration.

We are of the view, in these cases, that the common appellant having filed a copy of the judgment in one of the connected appeals and filed copies of decrees in each of all the appeals, the benefit of exclusion, on the basis of the endorsements, of the time taken in furnishing the certified copy of the judgment would not merely be available to the appeal in which the certified copy of the judgment was filed but would enure also to the other connected appeals filed by the same party against the common judgment. Accordingly, we hold that the appeals were all within time, and, that on that view, the petitions for excusing the delay are unnecessary. They are, therefore dismissed. No costs.

S.V.J. *Order accordingly.*

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1. (1928) 54 M.L.J. 696 : L.R. 55 I.A. 161 : A.I.R. 1928 P.C. 103.
2. (1920) I.L.R. 43 Mad. 633 : 38 M.L.J. 340.
3. (1907) I.L.R. 29 All. 264.

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. K. VEERASWAMI, *Chief Justice*, MR. JUSTICE M. NATESAN AND MR. JUSTICE B. S. SOMASUNDARAM.

M/s. M. Haji Mohamed Ismail Sahib and Company, Tanner Pernambut, North Arcot District .. *Petitioners**

v.

The State of Madras represented by the Deputy Commissioner, Commercial Taxes, Coimbatore, Dn. .. *Respondent.*

Madras General Sales Tax Act (IX of 1939), *section* 12-*B* (7) (a)—*Review under—Not intended to correct laches, omission or negligence of parties in not placing a relevant decision before Court.*

Application under section 38 (8) of the Madras General Sales Tax Act under section 151 Civil Procedure Code, for review of the Order of the High Court dated 6th December, 1965 in Tax Case No. 209 of 1963 presented to revise the order of the Sales Tax Appellate Tribunal, Madras dated 15th July, 1963 in T.A. No. 1087 of 1961 (Ref.No.A. 5.1527 of 1961 dated 18th May, 1961, relating to the Assessment Year 1951-52 on the file of the Deputy Commissioner (Commercial Taxes) Coimbatore-(order in A. 3-2071/51-52 dated 28th March, 1953, on the file of the Deputy Commercial Tax Officer, Gudiyatham).

M.R.M. Abdulkarim, for Petitioner.

The Advocate General, first Assistant Government Pleader, (*K. Venkataswamy*) and *J. Jayaram*, for Central Government Standing Councel, for Respondent.

The Order of the Court was made by

Veeraswami, C. J.—We are not satisfied that there is any substance in this review petition. It is said that *Firm A.T.B. Mehtab Majid and Co.* v. *State of Madras*[1], was a fact and that having not been placed before the Court when T. C. No. 209 of 1963 was disposed of that will be within section 12-B (7) (*a*) of the Madras General Sales Tax Act, 1939. That clause says that this Court might on the application either of the assessee or of the Deputy Commissioner, review any order passed by it under sub-section (*a*) " on the basis of facts which were not before it when it passed the order." Though *prima facie* those words may bring in a case like the one under consideration, we are inclined to think that the power being one of review, the general principles applicable to the power, which are so well settled by now, should be borne in mind in assessing the scope and effect of section 12-B (7) (*a*). Obviously review is not intended to correct the laches or omission or negligence of the parties in not placing the relevant decision before Court.

On that view, the petition is dismissed. No costs.

V.K. *Petition dismissed.*

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* T.C. Misc. P. No. 66 of 1966 in T.C. No. 209 of 1963. 19th November, 1969.

1. (1964) 1 S.C.J. 355 : (1964) 1 M.L.J. (S.C.) 115 : (1964) 1 An.W.R. (S.C.) 115 : (1963) 14 S.T.C. 355.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K.N. MUDALIYAR.

Krishnan .. *Petitioner**

Criminal Procedure Code (V of 1898), sections 479-A and 537—Scope of—Complaint under, without giving witness affected thereby opportunity of being heard—Illegal—Breach of provision—Court can draw inference of "presumed prejudice"—Section 537 inapplicable.

The clause " and may, if it so thinks fit " govern only the making of a complaint after giving the witness an opportunity of being heard. In other words " after giving the witness an opportunity of being heard " is not governed by the clause "if it so thinks fit". It is open to the presiding officer of the Court to hear the witness and then make or not make any compliant thereof in writing, according to the explanation of the witness. In the event of his thinking fit not to make a complaint after hearing the witness in his defence, it should be very clear that the witness would go unhampered by any trial, let alone a conviction. This is a very valuable right which cannot be denied to the witness who is going to be arraigned as an accused in criminal proceedings.

When there is a clear breach of the provision in the section, which is mandatory in its operation, one can draw the inference of " presumed prejudice ". The fact that the petitioner gave the explanation in the trial similar to the one given by him in the Sessions Court and also the fact that the criminal proceedings against him ended in a conviction and that the petitioner made a grievance of his conviction only at a late stage, are all of no matterial importance, for the complaint on which the entire criminal proceedings were launched was bad in law, and wholly without jurisdiction . The complaint itself being vitiated by an illegality, it is as good as complaint being *non est*, as it were.

If the petitioner is denied the opportunity of being heard, to which he has a right under section 479-A (1), the denial of such right is sufficient to cause prejudice to him and section 537 would have no applicability to such a case.

Held, The peresiding officer of the Court cannot really make or lodge a complaint without giving the witness affected thereby an opportunity of being heard. It is totally invalid and vitiated by an illegality. The clear breach of the terms of the sections would result in 'prejudice' to the petitioner. Petitioner's tardiness or remissness in not moving the Court at the earliest opportunity will not render a clear breach of a mandatory provision in law, an 'irregularity' whereas, in fact, it is an illegality.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Sessions Judge, Madurai, dated 2nd July, 1968 in C.A.No. 13 of 1968 (C.C.No. 199 of 1967 on the file of the Court of the District Magistrate (J.) Madurai).

K.R. Natarajan, for Petitioner.

The Additional Public Prosecutor, for State.

The Court made the following

ORDER :—The petitioner herein gave evidence in the committal Court that he had witnessed with his own eyes the murder of One Guruswami Kudumban by the accused Muthiah Kudumban. In the Sessions Court however, the petitioner resiled from that statement and maintained that he did not witness the occurrence at all. In view of this very material contradiction, the learned Sessions Judge of Ramanathapuram concluded that the petitioner had perjured ; and therefore he ordered the prosecution of the petitioner. This step—so the prosecution claims was

* Crl.R.C. No. 236 of 1969. 21st January, 1970.
(Crl. R.P. No. 234 of 1969.)

taken for the eradication of the evils of perjury and in the interests of justice. The learned Sessions Judge also observed that there was no need to give the petitioner any opportunity of being heard in that regard. The petitioner then faced a criminal trial for an offence under section 193, Indian Penal Code, and was convicted.

Mr. K. R. Natarajan appearing for the petitioner argued that before the complaint was laid against the petitioner by the learned Sessions Judge, Ramanathapuram, there ought to have been a notice given to the petitioner within the meaning of section 479-A (1), Criminal Procedure Code.

Before the argument is considered, I should like to set down the finding of the learned Sessions Judge, Madurai, on appeal against the petitioner's conviction for perjury to the effect that it is clear that the notice is mandatory and obligatory and that the witness should be given an opportunity of being heard as to what he has to say in regard to the contemplated complaint. In fact, the learned Public Prosecutor did not dispute the correctness of the proposition of law in the Court below. But the learned Sessions Judge (Madurai) holds that the conviction cannot be set aside on the ground of failure to give notice, for, in the opinion of the learned Sessions Judge, the explanation given by the petitioner before the learned Sessions Judge, Ramanathapuram (in the murder trial) was that the Police coerced him to give false evidence and accordingly he gave the statement that he saw the occurrence. In the course of the trial, the petitioner maintained that it was only because of coercion by the Police he gave a false statement in the committal Court. On the basis of this explanation, the learned Sessions Judge, Madurai, found that no prejudice has been caused to the petitioner because he did not raise any defence other than what he had stated in his plea or explanation before the Sessions Court.

It may be borne in mind that there was a complete trial of the petitioner ending in his conviction. The learned Sessions Judge felt that had the petitioner come by way of an appeal or a petition against the proceedings initiated against him on the ground that he had not been given an opportunity of being heard, one may be justified to draw interference of, or presume, prejudice. But, inasmuch as the entire proceedings have ended in the conviction of the petitioner, there is no "prejudice" shown by the petitioner. It is true that he did not raise any objection even before the trial Magistrate; and, therefore, in the appeal, the learned Sessions Judge held that the petitioner cannot be heard to urge such a plea, and more so, in view of the fact that he had no explanation other than what he had already offered before the Sessions Court, Ramanathapuram. The learned Sessions Judge (Madurai) ultimately found that though no notice, as required by law, has been given, the conviction of the petitioner, on that ground, cannot be questioned. The learned Sessions Judge confirmed the conviction against the petitioner made by the trial Court.

Section 479-A, Criminal Procedure Code, says:

"(1) Notwithstanding anything contained in sections 476 to 470 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the first class having jurisdiction, and may, if the accused is present before the Court, take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence before such Magistrate:

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(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200.

(3) No appeal shall lie from any finding recorded and complaint made under sub-section (1).

(4) Where, in any case, a complaint has been made under sub-section (1) and an appeal has been preferred against the decision arrived at in the judicial proceeding out of which the matter has arisen, the hearing of the case before the Magistrate to whom the complaint was forwarded or to whom the case may have been transferred shall be adjourned until such appeal is decided, and the appellate Court, after giving the person against whom the complaint has been made an opportunity of being heard, may, if it so thinks fit, make an order directing the withdrawal of the complaint; and a copy of such order shall be sent to the Magistrate before whom the hearing of the case is pending.

(5) In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under sub-section (1) the power conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the Appellate Court and where the Appellate Court makes such complaint, the provisions of sub-section (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard."

The question that falls for determination is, whether a breach of section 479-A (1) Criminal Procedure Code, would warrant presumed prejudice without further onus on the part of the petitioner to show prejudice either to his trial or conviction?

The clause in section 479-A (1) "and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing..." would render the only construction in harmony with the rest of the sub-clauses of the sub-sections, as follows: The clause "and may, if it so thinks fit" governs only the making of a complaint after giving the witness an opportunity of being heard. In other words, "after giving the witness an opportunity of being heard" is not governed by the clause "if it so thinks fit." It is open to the presiding officer of the Court to hear the witness and then make or not make any complaint thereof in writing, according to the explanation of the witness. In the event of his thinking fit not to make a complaint after hearing the witness in his defence, it should be very clear that the witness would go unhampered by any trial, let alone a conviction. In my view, this is a very valuable right which cannot be denied to the witness who is going to be arraigned as an accused in criminal proceedings.

In view of the above reasoning, I have no hesitation in holding that there is, in this case, a clear breach of the mandatory provision contained in section 479-A (1) Criminal Procedure Code, which has really resulted in the denial of a very valuable right, to the petitioner. When there is a clear breach of the provision in the section, which is mandatory in its operation, I consider that this is a fit case where one can draw the inference of "presumed prejudice." The fact that the petitioner gave the explanation in the trial similar to the one given by him in the Sessions Court and also the fact that the criminal proceedings against him ended in a conviction and that the petitioner made a grievance of his conviction only at a later stage, are all of no material importance, for, I consider that the complaint on which the entire criminal proceedings were launched was bad in law, and wholly without jurisdiction. The complaint itself being vitiated by an illegality, is as good as the complaint being *non est* as it were. In my view, the presiding officer of the Court had no jurisdiction to file complaint against the petitioner without giving him the opportunity of being heard.

Their Lordships of the Supreme Court have, while considering the effect of non-compliance with the provisions of section 360, Criminal Procedure Code, observed in *Narayana Rao* v. *The State of Andhra Pradesh*[1], as follows :

" Courts in India, before such matters were taken to their Lordships of the Judicial Committee of the Privy Council, had taken conflicting views on the scope of section 537 of the Code in curing such omissions as aforesaid. In the case of *Abdul Rahman* v. *The King Emperor*[2], their Lordships of the Judicial Committee had to consider the effect of non-compliance with the provisions of section 360 of the Code. After considering the relevant provisions of the Code, their Lordships came to the conclusion that it was a mere irregularity which could be cured by the provisions of section 537. In the case of *Pulukuri Kottayya and others* v. *King Emperor*[3], the judicial Committee had to consider the effect of breach of the statutory provisions of section 162 of the Code. The following observations of their Lordships, at pages 75-76, are a complete answer to the arguments advanced on behalf of the appellant before us, and we respectfully adopt them:

When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramania Iyer's case*[4], the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships' Board in *Abdul Rahman* v. *The King*[2], where failure to comply with section 360 of the Code of Criminal Procedure, was held to be cured by sections 535 and 537. The present case falls under section 537, and their Lordships hold the trial valid notwithstanding the breach of section 162."

Therefore, the question for consideration is, whether this breach of section 479-A (1), Criminal Procedure Code, is an 'illegality' or an 'irregularity'? I have already indicated that the clear breach of section 479-A (1) is an illegality.

Another ruling reported in *Chhacamilal Jain* v. *State of U. P.*[5], is cited from the Bar. In that decision, their Lordships held that if the accused is denied the opportunity of leading evidence which he has a right to do under section 208, the denial of such right is sufficient to cause prejudice to the accused and section 537 would have no application to such a case and that the possibility that the accused may not have produced defence if asked by the Magistrate whether he would do so, is of no consequence. Following the same reasoning in the present case: if the petitioner is denied the opportunity of being heard, to which he has a right under section 479-A (1), the denial of such right is sufficient to cause prejudice to him and section 537 would have no applicability to such a case. The possibility that the petitioner may not have given any other explanation than the one he had given either in the trial proceedings or in the Sessions Court, is really of no consequence.

Another decision of the Supreme Court reported in *Dr. Pal Chaudhry* v. *State of Assam*[6], throws a flood of light on the correct and proper interpretation and construction of this sub-section (Section 479-A (1) Criminal Procedure Code). In paragraph 9 of the judgment, their Lordships of the Supreme Court have observed as follows:

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1. (1957) S.C.J. 727 : (1957) 2 An.W.R. (S.C.) 139 : (1957) M.L.J. (Crl.) 690 : (1957) 2 M.L.J. (S.C.) 139 : (1958) S.C.R. 283 at 293.
2. (1929) L.R. 55 I.A. 96 : 54 M.L.J. 609.
3. (1947) L.R. 74 I.A. 65.
4. (1901) L.R. 28 I.A. 257 : I.L.R. 25 Mad. 61 : 11 M.L.J. 233.
5. (1960) S.C.J. 901 : (1960) M.L.J. (Crl.) 620 : A.I.R. 1960 S.C. 41.
6. (1960) S.C.J. 1079 : (1960) 2 An.W.R. (S.C.) 69 : (1960) M.L.J. (Crl.) 691 : (1960) 2 M.L.J. (S.C.) 69 : A.I.R. 1960 S.C. 133.

"The appellant's contention is that the terms of this section were not complied with. We think that this contention is justified. The present case is governed by sub-section (5) of section 479-A for here the complaint was not made by the trial Court but by the Appellate Court. Therefore the terms of both sub-sections (1) and (4) have to be complied with. The combined effect of these sub-sections is to require the Court intending to make a complaint, to record a finding that in its opinion a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice, it is expedient that such witness should be prosecuted for the offence and to give the witness proposed to be proceeded against, as opportunity of being heard as to whether a complaint should be made or not."

It follows from this paragraph that the petitioner proposed to be proceeded against, should have been given an opportunity of being heard as to whether a complaint should be made or not.

The plain meaning would be, in my view, that the presiding officer of the Court cannot really make or lodge a complaint without giving the witness affected thereby an opportunity of being heard; the intendment in the section is expressly seen from the fact that after giving that hearing to the petitioner it would be open to the Court to decide not to make a complaint. Otherwise, there would be no sense in directing that a hearing should be given. The Court may, after giving that hearing, decide not to make a complaint either for the reason that the Court is satisfied that no false evidence was given by the witness concerned or that such evidence was not intentionally false, or lastly, that it is not expedient in the interests of justice or to eradicate the evils of perjury, to make the complaint. In my view, the clear breach of the terms of the section would result in 'prejudice' to the petitioner.

Sadasivam, J., expresses a similar interpretation or construction in the following language in In re, *Virudan*[1].

"The clause 'may, if it so thinks fit' governs the clause 'make a complaint thereof in writing.' But if a Court wants to lay a complaint, it could do so only after giving the witness an opportunity of being heard. In fact, section 479-A Criminal Procedure Code as proposed by the Select Committee was passed in Parliament with an amendment providing that a witness, against whom the Court records a finding or perjury, shall be given an opportunity of being heard."

On this reasoning of the learned Judge, which is quite apposite to the facts of the present case, I have no hesitation in holding that the complaint is totally invalid and vitiated by an illegality. The learned Judge observes: "It is unnecessary for me in this case to give a definite finding whether the conviction could not be set aside on account of such defect, as in the present case, in preferring the complaint." Without giving a definite finding, Sadasivam, J., did not interfere because the petitioner before him had undergone the sentence of imprisonment.

Jagadisan, J., on a comparison of sub-sections (4) and (5) with section 479-A (1) has observed in *Rukmani Bai* v. *Govindaswamy*[2], as follows:

"It is possible to argue from this provisions that notice to the person complained against is not contemplated or provided for under sub-section (1) as otherwise there was no necessity for the Legislature to specifically state in sub-section (5), that no order shall be made without giving the person affected an opportunity of being heard. If sub-section (1) in its own terms mandatorily provides for the issue of notice to the person affected by the complaint, it would have been enough for the Legislature to say that the appellate Court may make the complaint in accordance with the provisions of sub-section (1). This is perhpas an indication that in the opinion of the Legislature, there is no necessity to issue notice to the person affected, if the complaint is directed to be filed by the very Court which

1. (1963) 1 Cri.L.J. 370. 2. (1963) 2 Cri.L.J. 355.

conducted the proceedings and in the Course of which it was found that a particular person was guilty of giving false evidence or fabricating documents but that, if the complaint is to be filed at the instance of some other Court even if it be the appellate Court, notice is necessary."

The learned Judge further observes:

" In my opinion on a strict construction of sub-section 479-A (1) notice to the person affected, namely, the witness charged with having given false evidence or fabricated false document is not necessary. But all the same notice should be issued as there is no reason why the well-known and well-accepted principle of '*audi alterem partem*' should not apply."

In my view, the construction placed by Jagadisan, J., is open to doubt in view of the authoritative interpretation of the Supreme Court in *Dr. Pal Chaudhry* v. *State of Assam*[1], I quite see that the observations of the Supreme Court were (sic) brought to the notice of the learned Judge deciding *Rukmani Bai* v. *Govindaswamy*[2].

Another decision has been cited from the Bar, reported in *Abdul Shakoor* v. *State of Rajasthan*[3]. Bhargava, J., holds that the provision under section 479-A (1) of giving an opportunity to the witness of being heard is mandatory and cannot be dispensed with. The learned Judge further observes that the insertion of the clause of giving an opportunity of being heard, in sub-section (5) is only to emphasise its need and has been made by way of abundant caution. The learned Judge further observes that there is no reason why this provision based on principles of natural justice should not be regarded as mandatory under sub-section (1) when it is so regarded under sub-sections (4) and (5), and that on its language it is the correct, interpretation and does not lead to any repugnancy between the provisions of sub-section (1) and sub-section (5), and that, on the other hand, it is more in consonance with reason and justice.

It is worthwhile to set down the following instructive observations made by Beaumont, C.J., in *Emperor* v. *Ningappa Ramappa*[4], although in the present case, there is the evidence of the petitioner before the committal Court as contra-distinguished from the statement recorded under section 164, Criminal Procedure Code. But the reasoning applies with equal force to the facts of the present case. The learned Judge says:—

"No doubt, a man making a statement on oath before a Magistrate under section 164, Criminal Procedure Code, should speak the truth but if he does not, the least he can do is to tell the truth when subsequently he goes into the witness-box. To prosecute a man who has resiled from a false statement made under section 164 is to encourage him in the belief that it pays to tell a lie and stick to it. It is far better that a man should escape punishment for having made a false statement under section 164, then that he should be induced to believe that is to his interest, however false the statement may have been to adhere to it, and thereby save himself from prosecution. The danger of such a course leading to the conviction of innocent persons is too great to be risked."

It is true that the proceedings taken against the petitioner ended in his conviction. It would have been far better for the petitioner to have moved the Court at least by way of revision at the earliest opportunity in regard to his grievance. His tardiness or remissness in not moving the Court will not render a clear breach of a mandatory provision of law, an 'irregularity,' whereas, in fact, it is an "illegality".

I set aside the conviction on the ground of 'presumed prejudice' resulting from a clear breach of the section. The petitioner is acquitted.

S.V.J. ——— *Petition allowed: Conviction set aside.*

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1. (1960) S.C.J. 1079 : A.I.R. 1960 S.C. 133.
2. (1963) 2 Cri.L.J. L.J. 355.
3. A.I.R. 1965 Raj. 195.
4. I.L.R. (1942) Bom. 26.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. S. KAILASAM AND MR. JUSTICE K. S. VENKATARAMAN.

Karuppan *alias* Mondi .. *Prisoner—Accused**

Criminal Procedure Code (*V of* 1898), *section* 164—*Applicability—Confession to magistrate before investigation had started—Formalities under section* 164 *not complied with—Admissibility.*

Section 164 of the Criminal Procedure Code, applies only to a confession made to a Magistrate in the course of an investigation under Chapter XIV of the Code. When an investigation had not yet started according to sections 156 and 157 of the Code and a confession is made to a Magistrate which in fact is the first information of the crime, section 164 can have no application. In such a case the confessional statement would not be rendered inadmissible because it was not recorded in accordance with section 164, Criminal Procedure Code.

Case-law discussed.

Referred Trial No. 70 *of* 1968:—Trial referred by the Additional Sessions Judge of the Court of Session of the Coimbatore Division at Coimbatore for confirmation of the sentence of death passed upon the said prisoner in Case No. 102 of the Calendar for 1968 on 23rd September, 1968.

Criminal Appeal No. 747 *of* 1968.—Appeal by the said prisoner (accused) against the said sentence of death passed upon him in the said case.

S. Radha, Advocate engaged under rule 241 of the Criminal Rules of Practice and Orders.

R. Veeramani, for Public Prosecutor, for State.

The Judgment of the Court was delivered by

Venkataraman, J.—The appellant has been convicted under section 302, Indian Penal Code, for committing the murder of his wife Kuppayee alias Kannammal by stabbing her with a knife on 16th February, 1968 (a Friday) about 10-30 A.M. and has been sentenced to the extreme penalty of the law, by the learned Additional Sessions Judge of Coimbatore.

The deceased was the second daughter of witness Subban (P.W. 8). He is a native of Chikkanoothu. He gives an account of the marital life of the accused and the deceased. They were married about ten years before the occurrence. They had three children. They lived together in Cheripalayam (more than ten miles from Chikkanoothu), the village of the accused for about seven years. The accused had, however, no separate house of his own and was living with one of his brothers and his mother. The deceased, however, was reluctant to continue to live with him unless he put up a separate house. She came away to live with her father in Chikkanoothu. In Karthigai preceding the occurrence (November, 1967), the accused also joined her because he had some stomach-ache. Some treatment was given to him therefor and he got cured. He then wanted his wife to go back with him to Cheripalayam, but she refused saying that she could not live in the pials of the houses of others.

P.W. 2 is the maternal uncle of the deceased. His village is Emmaigoundanpalayam, which is about half a mile south west of Cheripalayam. On Thursday, 15th February, 1968 P.W. 2 had come to Chikanoothu to see his son Govindan (P.W. 9) who was ill. After seeing him, P.W. 2 went to the house of his sister's husband (P.W. 8) to get back a loan of Rs.15. P.W. 2 slept in P.W. 8's house that night. P.W. 2 says that on the night of the Thursday the accused came to P.W 8's house and called his wife to go wih him to Cheripalayam. She refused to accom-

* R. T. No. 70 of 1968 (Crl. A. No. 747 of 1968). 11th July, 1969.

pany him till he built a house. P.W. 2, his sister Sankaral (mother of the deceased) and P.W. 8 advised the deceased to go with the accused to Cheripalayam so that they might bring back chickens and the dhal which they had left behind at Cheripalayam. She agreed to go with the accused. Accordingly, on the morning of Friday, 16th February, 1968 at 5 A.M., the accused and the deceased set out from Chikkanoothu to Cheripalayam. P.W. 2 accompanied them. P.W. 8 went with them for a short distance upto the bus stand at Moongitholuvu and then went away on his usual work of collecting village kist. P.W. 2, the accused and the deceased got into the bus, travelled in it and got down at Negamam, about 7 or 7-30 A.M. P.W. 2 says that he, the accused and the deceased then walked up to Kappalangarai, where in the tea shop of P.W. 10's father they took idlies and coffee. P.W. 10 also speaks to it. P.W. 2 says that they then proceeded by foot northwards on the Negamam-Coimbatore Road for a distance of two to three furlongs. That has been marked in the sketch (Exhibit P-22). At a particular place, P.W. 2 branched off westwards on the cart-track to his village Emmaigoundanpalayam. It was about 9 A.M. then. The accused and the deceased went northwards on the Negamam-Coimbatore Road.

Witness Palaniammal (P.W. 4) claims to have seen the accused and the deceased at 10 A.M. on the Negamam-Coimbatore Road, when they were standing under a tamarind tree to the south-east of Ranga Thevar's land. P.W. 4 being a resident of Cheripalayam knew them for eight or nine years. She asked them why they were standing there. The accused replied that they were standing there in order to proceed to their village Cheripalayam. P.W. 4 then proceeded southwards to Kappalangarai to board a bus there to Nadupalli. When she was waiting there for the bus, she saw the accused coming along the road towards Kappalangarai with his dhoti folded up and tied above his knee. He was coming hurriedly. P.W. 4 asked him why he alone was coming south without his wife. The accused replied that his wife had proceeded towards the north to go to Cheripalayam and that he had to go south for some business. He went away towards the south. P W 4 then boarded a bus and went to Sulaikal. She returned to her village on Sunday 18th February, 1968 and she was examined by the Sub-Inspector on that day.

P.W. 4 was the person to see the accused and the deceased together last. As to what happened thereafter there is no direct evidence, but there are two confessional statements of the accused, Exhibits P-1 and P-7. We shall presently refer to the circumstances under which those statements were recorded. According to those statements when they were going in the field south of Cheripalayam, about 10-30 A.M. the accused stabbed his wife with the knife which he was having (M.O.1). The later autopsy shows that the accused had inflicted a number of stabs on the deceased and that death must have been at the same spot and practically instantaneous. The place of murder has been marked in the sketch as two furlongs north-west of the tamarind tree where P.W. 4 had last seen them.

Easwaran (P.W. 3) is a resident of Cheripalayam. He swears that on Friday, 16th February, 1968, about 11 A.M. he saw the accused running towards the *ittei* leading to Emmaigoundanpalayam from the field in the north. P.W. 3 saw him from a distance of 25 feet on the south. P.W. 3 asked him where he was going. The accused replied that he was going on an urgent errand southwards. So saying he ran to the east and then towards the south along the main road. For the sake of the narrative it may be explained here that after the murder P.W. 3 was the first person who saw the accused and, as we have noted, P.W. 4, saw him later at the bus stand at Kappalangarai.

The next stage in the evidence is that about 11-20 A.M., on 16th February, 1968, when P.W. 5, the former Village Headman of Chettikkapalayam, was going to the Taluk Office, Pollachi, and had entered the Sub-Collector's Office compound, the accused who was known to him called him, 'Sami' (Sir), P.W. 5 turned round and asked him where he had come. The accused told him that he had stabbed his wife and had come away and that he wanted to go to the Court and desired the

witness to take him to the Court. The witness asked the accused whether his wife was alive or dead. The accused replied that he did not know. The accused was having the knife (M.O. 1) in his waist and he showed it to him. P.W. 5 pointed out that there were no blood-stains on his dhoti or on the knife. The accused replied that he had washed them. By then they had reached the gate of the Sub-Magistrate's Court. P.W. 5 told him that that was the Court and asked him to go there and tell the Magistrate whatever he wanted to say. P.W. 5 then went to the Taluk Office in connection with his work.

P.W. 1 was the Sub-Magistrate, Pollachi. He says that on 16th Feruary, 1968 at 11-45 A.M., when he was in the open Court conducting a trial, the accused appeared before him and wanted to make a statement. He recorded the statement in the words of the accused and read it over to him. The accused admitted it to be correct and affixed his thumb-impression. ExhibitP-1 is the statement. A question has been raised as to the admissibility of Exhibit P-1.

[After discussing the evidence his lordship proceeded to discuss the admissibility of Exhibit-P-1].

At this stage we may dispose of the objection about the admissibility of Exhibit P-1. The objection is that the statement was not recorded after observing the formalities prescribed under section 164 of the Criminal Procedure Code and is, therefore, inadmissible ; that is to say, that P.W. 1 did not warn the accused that he was not bound to make a confession, that if he did so it might be used as evidence against him and that further the Magistrate did not record any memorandum that after questioning the accused he had reason to believe that he was making the statement voluntarily. Further as required by the Criminal Rules of Practice he did not give him time for reflection. Moreover questions if any put by the Magistrate were not recorded. In support of this objection the decision of their Lordships of the Privy Council in *Nazir Ahmed* v. *The King Emperor*[1], is relied on. The objection is however not tenable because section 164, Criminal Procedure Code, applies only to a confession made to a Magistrate in the course of an investigation under Chapter XIV. Thus section 164 (1) states :

"Any Presidency Magistrate any Magistrate of the first-class and any Magistrate of the second class especially empowered in this behalf by the State Government may if he is not a police officer record any statement or confession made to him in the course of an investigation under this Chapter or under any other law for the time being in force or at any time afterwards before the commencement of the inquiry or trial."

Here, however the investigation had not yet started according to sections 156 and 157, Criminal Procedure Code. The information of the crime had not rached the police and Exhibit P-1 was, in fact, the first information of the case and that was given to the Magistrate himself. Apart from the wording of the section, the principle of the section is that once investigation has started there is the danger of the accused being induced by the police by promise or coercion to make a confessional statement and that is why elaborate precautions have been prescribed in section 164, Criminal Procedure Code before a Magistrate could record a confession so as to ensure that the confession was voluntary and free from any such influence. Such inducement by the police cannot, however, arise in a case like this where the accused goes straightaway to the Magistrate before the police receive information of the offence. The Privy Council case was one where the investigation had started, but the Magistrate in flagrant violation of section 164, Criminal Procedure Code, recorded memoranda of the places pointed out by the accused and his confessional statement. That was why the oral evidence of the Magistrate was prohibited. The following sentence in the judgment of their Lordships of the Privy Council shows that the observations apply only to the confession made to a Magistrate during an investigation.

1. (1936) I.L.R. 17 Lah. 629 (P.C.) : L.R. 63 I.A. 372 : 71 M.L.J. 476.

"Their Lordships are, however, clearly of opinion that this unfortunate position cannot in future arise because, in their opinion, the effect of the statute is clearly to prescribe the mode in which confessions are to be dealt with by Magistrates *when made* during an investigation, and to render inadmissible any attempt to deal with them in the method proposed in the present case."

That is how the Privy Council decision has been distinguished by a Bench of to Cour in *Nainamuthu*, In re.[1], where also he information given by the accused to the Magistrate was itself the first information of this crime. Under similar circumstances the Bench decision was followed by a Bench of the Andhra Pradesh High Court in *Yendra Narasimhamurthy*, In re[2].

There is, however, a Bench decision of this Court Somasundaram and Ramaswami Goundar, JJ.) in *Thothan* alias *Ekan*, In re.[3], which sounds a contrary note. The facts stated at page 207 are these. P.W. 8 gave a report, Exhibit P-6 before the Village Munsif. The Village Munsif sent is usual reports to the police and the Magistrate. The Sub-Inspector (P.W. 17) on receiving the report, reached the place of occurrence, held the inquest and sent the body for post-mortem examination. Meanwhile, on 8th March, 1955, about 5 P.M., the appellant appeared before the Sub-Magistrate with the knife (M.O.3) and gave a statement (Exhibit P-1) and surrendered the knife. At page 208 we find this :

"Exhibit P-1 is the first statement made by the appellant before the Sub-Magistrate, before investigation started wherein he has confessed that he had stabbed his wife to death".

Following the Privy Council decision, the statement was held to be inadmissible. The Bench decision in *Nainamuthu*, In re.[1], was not referred to, probably because the confessional statement, Exhibit P-1, was not first information report of the crime. It is not clear from the report of the facts whether the confessional statement was given after the report Exhibit P-6 had reached the police. If it was given after the report had reached police, then investigation must be deemed to have started under section 157, Criminal Procedure Code, and section 164, Criminal Procedure Code, would come into play and render the confessional statement inadmissible, since it was not recorded in accordance with section 164, Criminal Procedure Code. It is the only way in which the case could be distinguished. If the facts were otherwise, it may require reconsideration.

There is a decision of a Bench of the Patna High Court in *Rishi* v. *State of Bihar*[4], where a Sub-Divisional Magistrate (Sri A. Haseeb) was returning in a jeep and found two carts loaded with rice. When questioned by the Sub-Divisional Magistrate, the cart-men admitted that the bags containing rice was loaded by one Rishi Dutta. The transport of rice was prohibited. It was held that the statements made by the cart-men were inadmissible, in view of the observations of the Privy Council in *Nazir Ahmad's case*[5], With great respect, it seems to us that section 164, Criminal Procedure Code, did not apply to that case, because investigation had not yet started under Chapter XIV.

We think we may usefully refer to the decision of the Allahabad High Court in *Emperor* v. *Ram Naresh*[6], where two persons, who along with some others were accused of a crime, went into a Magistrate's Court, confessed their guilt and asked that they should be arrested and sent to jail so that they should not fall into the hand of the police. The Magistrate sent for a petition writer who went into the Court-room and took down the petition containing the confession to the dictation of the two persons and the petition was then signed by them. The confession was not recorded

1. (1940) 2 M.L.J. 89 : I.L.R. (1940) Mad. 428 : A.I.R. 1940 Mad. 138.
2. (1965) M.L.J. (Crl.) 800 : (1965) Crl.L.J. 509 : (1965) 2 An.W.R. 344.
3. (1956) 1 M.L.J. 206.
4. A.I.R. 1955 Pat. 425.
5. (1936) I.L.R. 17 Lah. 629 (P.C.) : 71 M.L.J. 476.
6. I.L.R. (1939) All. 377.

and verified by the Magistrate in accordance with sections 164 and 364, Criminal Procedure Code. It was held that the confession was admissible under section 21 of the Evidence Act, that the Evidence Act was a special law and that it was not affected by the procedural law of the Criminal Procedure Code. The Privy Council case was distinguished with the observation :

> " ......but that decision is quite irrelevant to the question which was before the Court. Their Lordships held that a Magistrate could not give oral evidence of a confession made to him if he deliberately ignored the provisions of sections 164 and 364 of the Code of Criminal Procedure and did not even purport to act under those sections. There was no question in the case before me of the admissibility of oral evidence given by a Magistrate."

We have referred to this case, because it has received the approval of their Lordships of the Supreme Court in *State of Uttar Pradesh* v. *Singhara Singh*[1]. It was a case where a Magistrate not empowered to record confessional statements under section 164, Criminal Procedure Code, purported to record the statement under section 164, Criminal Procedure Code, in the course of police investigation, and, because he was not empowered to record the statement, the statement itself was not sought to be used, but oral evidence was adduced that he recorded the confession. *Nazir Ahmed's case*[2], was sought to be distinguished on the ground that it did not apply to a case of a Magistrate not empowered to record a confessional statement under section 164, Criminal Preedure Code. This evidence was excluded by the High Court in appeal. On the further appeal to the Supreme Court, the question raised was whether the evidence was rightly excluded. Their Lordships held that the evidence was rightly excluded, on the ground that, when a statute confers a power on cretain judicial officers, that power can obviously be exercised only by those officers and not by Magistrates of lower classes. That is the main decision in the case, but, in the course of the discussion, their Lordships distinguished *Emperor* v. *Ram Naresh*[3], referred to by us, with the following observation :

> "It was held, and we think rightly, that *Nazir Ahmed's case*[2], did not prevent the petition being admitted in evidence because it only forbade certain oral evidence being given ".

Though the reason given is that oral evidence was not sought to be adduced and only oral evidence was forbidden by the Privy Council decision, it seems to us that the above observations of the Supreme Court lend support to our view that a statement like Exhibit P-1 in this case, which is itself the First-Information Report of the crime to the Magistrate, does not fall within the provisions of section 164, Criminal Procedure Code.

There is another Bench decision of this Court (Mack and Chandra Reddy, JJ.) in *Ramaswami Reddiar*, In re[4], where the Magistrate not empowered to record a confessional statement under section 164, Criminal Procedure Code, but had the power to hold an inquest, held an inquest under section 175, Criminal Procedure Code Accused 1 and 2 were also examined then. On his becoming aware that they were making confessions, the Magistrate refrained from administering the oath to them, in correct conformity with section 342 (4), Criminal Procedure Code. After the statements were recorded, they were read out to the accused and were signed by them. They were recorded on police case diary paper. The formalities under sections 164 and 364, Criminal Procedure Code, were not complied with. The Bench held that *Nazir Ahmed's case*[2], did not apply to the case, because, firstly, the Magistrate was not empowered to record confessions under section 164, Criminal Procedure Code, and secondly, the Magistrate was empowered to hold the inquest

1. (1965) 1 S.C.J. 184 : (1964) 4 S.C.R. 485 : A.I.R. 1964 S.C. 358 : (1965) M.L.J. (Crl.) 72.
2. (1936) 17 Lah. 629 (P.C.) : 71 M.L.J. 476.
3. I.L.R. (1939) All. 377.
4. (1952) 2 M.L.J. 814 : I.L.R. (1953) Mad. 924.

and he was only acting within the powers conferred on him. It is stated at page 929 of the Report that the inquest was held by him as 'an inquiry into the cause of death' in addition to the investigation held by the police officers, who were while the inquest was in progress, making their own investigation. This shows that the police had already taken up the investigation and it must be so since usually inquests are held only after the police commence investigation. Here therefore was a case where though investigation, by the police had started under Chapter XIV, the confessional statement was recorded by the Magistrate not empowered under section 164, Criminal Procedure Code. It seems to us that the above decision cannot be considered good law, in view of the later decision of the Supreme Court in *State of Uttar Pradesh* v. *Singhara Singh and others*[1], referred to above. It is true that the Magistrate was empowered to hold an inquest under section 176, Criminal Procedure Code. But the Court must adopt a harmonious construction of sections 176 and 164, Criminal Procedure Code, on the principle pointed out in another decision of the Supreme Court, *viz., Deep Chnad* v. *The State of Rajasthan*[2]. There, in a verification proceeding held by the Magistrate, he prepared a memorandum recording his own observations as also the statement made to him by a prosecution witness but not in the manner prescribed by section 164, Criminal Procedure Code. It was contended that the memorandum of observations would be admissible under section 9 of the Evidence Act which makes relevant the facts establishing the identity of a thing. Their Lordships pointed out that section 9 of the Evidence Act and section 164, Criminal Procedure Code, must be read together and harmoniously construed so as to give full effect to both of them and observed :

> " If a Magistrate speaks to facts which establish the identity of any thing, the said facts would be relevant within the meaning of section 9 of the Evidence Act but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of section 164 of the Code of Criminal Procedure, such part of the evidence, though it may be relevant within the meaning of section 9 of the Evidence Act, will have to be excluded. By such a construction of the provisions a satisfactory solution could be evolved."

Applying the above principle to the facts in *Ramaswami*, In re[3], the correct position would be that the statements of the persons other than accused 1 and 2 would be admissible under section 176, Criminal Procedure Code, but not the statements of the accused 1 and 2.

It will be seen that in the case on hand before us, no such difficulty arises, as investigation under Chapter XIV, had not started and Exhibit P-1 was itself the first informaton in the case.

Some other cases have been referred to, but we do not think it necessary to refer to them, because in those cases investigation under Chapter XIV, had started and it was held, for instance, that the provisions of section 164, Criminal Procedure Code, could not be circumvented by producing the accused to a Magistrate not empowered to record a confessional statement under section 164, Criminal Procedure Code.

Finally, we may add that, even if we exclude Exhibit P-1, the remaining evidence in this case is ample to sustain the conviction of the appellant. The knife (M.O. 1) which the accused produced and his dhoti (M.O.6) were found to contain human blood. The sandals (M.O 3) which were recovered from near the corpse have been identified by P.Ws. 2 and 8 as belonging to the accused. P.W. 2 did not mention that circumstance of ownership to the police and in the committal Court, but even if P.W. 2's evidence is left out of account, the evidence of P.W. 8 cannot be left out of account. It will be noted that the accused himself has admitted that M.O. 3

1. (1964) 4 S.C.R. 485 : (1965) 1 S.C.J. 184 : (1965) M.L.J. (Crl.) 72.
2. (1962) 2 S.C.J. 655 : (1962) M.L.J. (Crl.) 678 : (1963) An.W.R. (S.C.) 1 : (1963) 1 M.L.J. (S.C.) 1 : (1962) 1 S.C.R. 662 : A.I.R. 1961 S.C. 1527.
3. (1952) 2 M.L.J. 814 : I.L.R. (1953) Mad. 924.

series belonged to him and were presented to him by P.W. 8, but he would say that he had left them behind in P.W. 8's house, because he was taken in a cart. That is an incredible story. The sandals (M.O. 3) were found very near the corpse and contained human blood. That again shows that accused's connection with the murder.

There can be no doubt whatever that the accused is guilty under section 302, Indian Penal Code, for the murder of his wife.

The only question which his learned Counsel Kumari Radha could press on his behalf seriously was that of sentence. Though the murder was deliberate, according to Exhibit P-7, the evidence including the confessional statement shows that the wife had been refusing to live with him in Cheripalayam, because the accused did not have a separate house. Further he also suspected her fidelity. Again, according to Exhibit P-7, she refused to accompany him to Cheripalayam but started going back to Chikkanoothu. In view of these circumstances, we reduce the sentence to one of imprisonment for life.

V.K. ——— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE T. RAMAPRASADA RAO.

The Management of Sree Rajendra Mills Ltd., Salem-7. .. *Petitioner**

v.

The Presiding Officer, Labour Court, Coimbatore and others .. *Respondents.*

Industrial Disputes Act (XIV of 1947), sections 25-J and 33-C (2)—Agreement not to claim lay off compensation—Validity.

Section 25-J of the Industrial Disputes Act, 1947, makes it clear that the provisions of Chapter V of the Act will prevail and can be invoked in respect of retrenchment or lay off compensation payable by an employer to his workmen notwithstanding any agreement or settlement to the contrary arrived at between them. Hence the workers of an establishment can invoke the jurisdiction of the Labour Court under section 33-C (2) of the Act for involuntary unemployment and any settlement arrived at between the employer and workers outside the provisions of Chapter V of the Industrial Disputes Act in avoidance of such liability cannot stand in the way of the rights of the workers.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in C.P. No. 278 of 1966 on the file of the Labour Court, Coimbatore and quash its common order passed therein and dated 18th August, 1966.

M. R. Narayanaswami and *D. Meenakshisundaram*, for Petitioner.

G. Venkataraman, for Respondents.

The Court made the following

ORDER.—This writ petition which is set along with a batch of Writ Petitions, is to quash the order of the Labour Court, Coimbatore in C.P. No. 278 of 1966. The short facts are that the 2nd respondent representing some of the workers of the petitioner management filed applications under section 33-C (2) of the Industrial Disputes Act for compensation for involuntary unemployment for a period of 45 day, during January to November, 1965 and for a period of 30 days during December, 1965 to February, 1966. The respondent's case was that they were entitled to lay off compensation under the Industrial Disputes Act. But the petitioner contended that there was a settlement or arrangement between its workers and itself

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* W.P. No. 2018 of 1967. 14th October, 1969.

in an independent proceeding anterior to the period of involuntary unemployment and such settlement would bind the workers and would consequentially disentitle them from making a claim under section 33-C (2). The Labour Court went into the question and found as a fact that the agreement was not strictly applicable to the instant case, because that agreement, even if it could be pressed into service, refers only to badly workers and not to permanent workers. In any event, the Labour Court was of the view that there is a statutory interdict in section 25-J of the Act which prevented the operation of such settlements between the management and the workers outside the purview of the Act.

It is as against this the present Writ Petition has been filed by the management. Mr. M. R. Narayanaswami, learned Counsel for the petitioner, would reiterate that the settlement referred to in paragraph 28 of the order of the Labour Court would factually apply to the circumstances of this case and even otherwise such arrangement *inter se* between the employer and the employee is workable and can be implemented. I am not able to agree. On a perusal of the agreement, an excerpt of which is found in paragraph 28 of the order, it is seen that it essentially refers to badly workers and does not *ex facie* refer to permanent workers. On this ground the first contention of the petitioner should fail.

As regards the other ground that agreement *de hors* the provisions of the Industrial Disputes Act can be pressed into service in a claim under section 33-C (2) notwithstanding the presence of section 25-J, I am not able to appreciate this contention either. Sub-clause (2) of section 25-J of the Act makes it clear that the provisions of Chapter V of the Industrial Disputes Act ought to and will prevail at all material times when the question is as to what is the lay off or retrenchment compensation which has to be paid by the management to the workers. The mandate in the sub-clause is imperative and it reads that the right and liabilities of employer and workman in so far as they relate to lay off and retrenchment shall be determined in accordance with the provisions of this chapter. This mandate in the later part of sub-section (2) of section 25-J imports into the subject a compulsory following up of the provisions of Chapter V of the Act and an implied avoidance of any arrangement or settlement outside the provisions of that chapter between the employers and workmen. This being the scope of sub-clause (2) of section 26-J the Labour Court rightly found that the lay off compensation was to be reckoned and determined in accordance with the provisions of the Act and not with reference to any settlement as projected by the management.

No other point survives in this writ petition. The order of the Labour Court is well within its jurisdiction. The Writ Petition is therefore dismissed. There will be no order as to costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE M. M. ISMAIL.

The Ouchterlony Valley Estates (1938) Ltd., New Hope Post, Nilgiris .. *Petitioner**

v.

The Regional Provident Fund Commissioner, III Mount Road, Madras-6 and another .. *Respondents.*

Employees Provident Funds Act (XIX of 1952), sections 7-A and 14-B—Recovery of damages from an employer for delayed payment of contribution—Necessity for notice and enquiry before demanding compensation.

A claim for compensation under section 14-B of the Employees Provident Funds Act, 1952 will also be an amount payable under the provisions of the Act and as

* W.P. No. 3977 of 1967. 31st October 1969.

such the provisions of section 7-A will apply to such a case. Hence the question whether damages should be claimed at all in any case for delayed payment of contribution and, if so, what should be the quantum of such damages is one that should be decided only after giving notice to the person concerned and giving him a reasonable opprtunity of representing his case.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondents herein to forbear from levying and collecting damages under section 14-B of the Employees Provident Funds Act (Central Act XIX of 1952) from the petitioner for delayed payment of contributions under the said Act and the scheme framed thereunder for the period May, 1966 to July, 1966 in pursuance of the order of the second respondent herein in Memorandum No. 120660-Lab.C. 1/66-3 dated 29th August, 1967.

M. R. Narayanaswamy, for Petitioner.

S. Ramasubramanian, for Central Government Standing Counsel, for Respondents.

The Court made the following

ORDER.—This writ petition is for the issue of a Writ of *mandamus* directing the respondents herein to forbear from collecting damages under section 14-B of the Employees Provident Funds Act from the Petitioner for delayed payment of contributions under the said Act and the scheme framed thereunder for the period May, 1966 to July, 1966.

From the very nature of the case the question whether damages should be claimed at all and, if so, what should be the quantum of the damages is one which can be decided only after notice to the person concerned. Apart from that, section 7-A (3) provides that no order determining the amount due from any employer shall be made under sub-section (1) of section 7-A, unless the employer is given a reasonable opportunity of representing his case. Sub-section (1) of section 7-A states that the Central Provident Fund Commissioner, any Deputy Provident Fund Commissioner or any Regional Provident Fund Commissioner may, by order, determine the amount due from any employer under any provision of the Act or of the scheme, and for this propose may conduct such enquiry as he may deem necessary. The damages payable under section 14-B of the Act is undoubtedly an amount payable under a provision of the Act. Therefore, both section 7-A (1) and section 7-A (3) will apply to such a case. It is admitted before me that no opportunity as contemplated by section 7-A (3) has been given to the petitioner in this case before making the demand for payment of damages. On this simple ground the writ petition is allowed. The result of this will be that if the respondents want to levy damages and claim the same from the petitioner, they will have to proceed against the petitioner after giving the opportunity contemplated by section 7-A (3) of the Act. There will be no order as to costs.

R.M. *Petition allowed.*

[END OF VOLUME (1970) 1 M.L.J. REPORTS.]